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TITLE: *The Approach of the European Court of Human Rights to Environmental Protection*

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ABSTRACT:

The thesis aims to analyse the protection of environmental interests through the cases decided by the European Convention of Human Rights. The Convention does not include a right to a healthy environment. However, in recent years the European Court of Human Rights has given a number of innovative judgments acknowledging applicants' causes of action in environmental cases. The new jurisprudence poses crucial questions on the interpretation of the Convention and admissibility requirements to bring a case to the Court. The paper will seek to offer an overview of these developments.

The first chapter gives a general outline on the conceptual and legal linkage between human rights and environmental protection, giving an account of the Council of Europe's position on the matter. The analysis then proceeds to a detailed review of the Court's jurisprudence in connection with each of the provisions that have found application in environmental cases, namely the right to respect for one's home, private and family life; the right to life; the right to a fair trial and the right to a remedy. The conclusions summarize the features of the Court's jurisprudence, commenting on its role in the protection of environmental interests within the Member States of the Council of Europe

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***The Approach of the European Court of Human Rights to  
Environmental Protection***

ANNALISA SAVARESI

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***INTRODUCTION***

The present paper aims to analyse the protection of environmental interests through the cases decided by the European Convention of Human Rights. The Convention does not include a right to a healthy environment. Still, in recent years the European Court of Human Rights has given a number of innovative judgments acknowledging applicants’ causes of action in environmental cases. The new jurisprudence poses crucial questions on the interpretation of the Convention and admissibility requirements to bring a case to the Court. The paper will seek to offer an overview of these developments, starting from a general outline on the conceptual and legal linkage between human rights and environmental protection, giving an account of the Council of Europe’s position on the matter. The analysis will then proceed to detailed review of the Court’s jurisprudence in connection with each of the provisions that have found application in environmental cases. The conclusions will comment on the Court’s role in the protection of environmental interests within the Member States of the Council of Europe.

# 1. The protection of the environment and human rights law

The term *environment* refers to ‘*the surrounding conditions of something*’, typically entailing some relational significance.<sup>1</sup> The legal notion of environment varies from system to system. By way of abstraction, it is possible to say that environmental legislation pertains to different physical living and non-living entities, including air, land, water and wildlife. Most of these entities do not fall within proprietary schemes and have long been considered *res nullius*, characterised by open access, or *res communes omnium*, collectively owned and managed by a community, in a way that no single user could have exclusive rights to them.<sup>2</sup> The protection of this kind of entities and the identification of subjects responsible for their care pose a series of legal questions.<sup>3</sup> Generally, governmental and administrative bodies are the main actors to this effect and private individuals only come into play in cases of direct interference with their personal spheres. An increasing number of legal systems, however, provide instruments of public participation in environmental decision-making and adjudication, supplementing and scrutinising governmental action in environmental matters.<sup>4</sup> The resulting legal framework is a complex system of criminal, civil and administrative law, both at domestic and international levels.

The protection of the environment through legal means aims to ensure both the preservation of resources and the remedy of damage or loss. Preventive measures rule human activities through the use of command and control regulations and market-based instruments, whereas remedial measures serve to identify the subjects responsible for recovery and the techniques to use for the purpose.<sup>5</sup>

The protection of human rights is based on respect for human dignity.<sup>6</sup> There is no univocal notion of human rights. For simplification, human rights may be defined as *most basic rights*, pertaining to what is *essentially human*, thus assigning priority to ‘*certain human or social attributes regarded as essential to the adequate functioning of a human being*.’<sup>7</sup> The elaboration of the human rights doctrine has contributed to shifting the focus of international legal relations from the pursuit of States’ self-interest to a core of fundamental values, imposing limits on States’ exclusive jurisdiction over their nationals.<sup>8</sup> This has led to the introduction of numerous instruments for the monitoring, implementation and enforcement human rights, both at domestic and international levels.

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<sup>1</sup> M. PRIEUR, *Droit de l’Environnement*, Paris, 1984, p. 4.

<sup>2</sup> J. VOGLER, *The Global Commons*, Liverpool, 2002, p. 4.

<sup>3</sup> On the subject, cf. G.W. HARDING, *The Tragedy of the Commons*, 162 *Science* 1243 (1968); J. SAX, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, in 68 *Michigan Law Review*, 471 (1970); R.J. LAZARUS, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Effective Judicial Intervention*, 71 *Iowa Law Review* 631 (1986); by the same author cf. also: *Pursuing ‘Environmental Justice’: The Distributional Effects of Environmental Protection*, 87 *New York University Law Review* 787 (1993).

<sup>4</sup> For an overview of these questions, see PRING, NOE’, *The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development*, in *Human Rights in Natural Resources Development*, edited by ZILMAN, LUCAS, PRING, Oxford, 2002.

<sup>5</sup> For a general introduction on these notions, see D. WILKINSON, *Environment and Law*, London, 2002.

<sup>6</sup> Cf. Preamble to the Universal Declaration of Human Rights, UN G.A. Res. 217A, UN, 1948.

<sup>7</sup> M. FREEDEN, *Rights*, Open University Press, 1991, p. 6. According to another definition, ‘a human right by definition is a universal moral right. Something which all people everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human’, cf. M. CRANSTON, *What are Human Rights?* London, 1973, p. 36.

<sup>8</sup> Cf. A. CASSESE, *International Law*, 2<sup>nd</sup> ed. 2005, p. 375.

The environment represents the precondition to all human activities and, arguably, a *condicio sine qua non* for numerous human rights.<sup>9</sup> A link between human rights and the environment may therefore be derived from the very fact that human health and existence are dependent upon environmental conditions.<sup>10</sup>

The link between human right and environmental protection is justified by the intent of joining efforts. Both environmental and human rights protection strive to reduce the reserved dominion of States' jurisdictions at the international level and the unaccountability of governmental and private actors at the domestic level.<sup>11</sup> Additionally, while improved environmental conditions may contribute to the fulfillment of human rights standards, the achievement of a high level of compliance with human rights law is susceptible of enabling better environmental protection. In the perspective of enforcement, human rights law supplies unique avenues of redress beyond national States that are so far unknown to international environmental law.<sup>12</sup> Linking environmental and human rights protection may therefore create a forum for redress and precautionary remedies for victims of domestic environmental abuses.

The first acknowledgement of this nexus came with the 1972 Stockholm Declaration on Human Environment, according to which:

*'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.'*<sup>13</sup>

In subsequent years, the United Nations established a subsidiary body by the General Assembly, the UN Environmental Program (UNEP), with the scope to promote international cooperation in the field of environmental protection and provide general policy guidance for environmental programs within the UN system.<sup>14</sup> This mandate was later strengthened, as UNEP was also given the task of promoting cooperation on policy-making, monitoring, assessment and development of international environmental law.<sup>15</sup>

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<sup>9</sup> In the wording of Judge Weeramantry: 'the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights, such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments' Gabčíkovo-Nagymaros Dam Case, ICJ Rep. 1997, p. 7.

<sup>10</sup> For a comprehensive introduction on the interrelation between human rights, see M. ANDERSON, A. BOYLE eds., *Human Rights Approaches to Environmental Protection*, Oxford, 1996; A. SACHS, *Eco-justice: Linking Human Rights and the Environment*, Worldwatch Institute, 1995; R. PICCOLI, D. TAILLANT, *Linking Human Rights and the Environment*, Arizona, 2003.

<sup>11</sup> M. ANDERSON, *Human Rights Approaches to Environmental Protection: an Overview*, in M. ANDERSON, A. BOYLE eds., *Human Rights Approaches to Environmental Protection*, Oxford, 1996, p. 2.

<sup>12</sup> In this respect, the Compliance Committee of the Meeting of the Parties to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/MP/PP/C.1/2005/2/Add.1, 11 March 2005) represents a most interesting and welcome novelty.

<sup>13</sup> Declaration of the United Nations Conference on Human Environment, Stockholm, 1972, UN Doc. A/CONF/48/14/REV.1, at Principle 1.

<sup>14</sup> UN General Assembly Resolution 2997 (XXVII) of 15 December 1972.

<sup>15</sup> Cf. Agenda 21, adopted at the UN Conference on Environment and Development (the Earth Summit) in 1992, at Chapter 38. Cf. also the Nairobi Declaration on the Role and Mandate of UNEP, adopted by the UNEP Governing Council in 1997.

Today a large number of national, regional and international instruments stress the intrinsic relationship between the preservation of the environment, development and the promotion of human rights.<sup>16</sup> On the domestic side, more than 100 constitutions guarantee the right to a clean and healthy environment or the State's obligation to prevent environmental harm.<sup>17</sup> At the international level, the formal recognition of specific environmental rights may be found in some UN documents<sup>18</sup> and regional instruments.<sup>19</sup>

The interrelation of human rights and environmental protection has been exemplarily embodied in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>20</sup> Article 1 of the Convention expressly provides a right to a healthy environment to present and future generations,<sup>21</sup> requiring State Parties to introduce procedures supporting the development of environmental aims, articulated in three 'pillars': access to information, public participation and access to justice.<sup>22</sup> The Convention represented a landmark in the attempt to join the protection of human rights and environmental protection and to date has 40 signatories and 36 ratifications.

In spite of these developments, the existence of a fundamental right to a clean environment in international law is controversial and not supported by any global human rights treaty.<sup>23</sup> In the perspective of existing law, however, failure to provide

<sup>16</sup> Cf. Report of the Secretary General of the UN Commission on Human Rights, Science and Environment: Human Rights and the Environment as a Part of Sustainable Development, submitted in January 2005, according to which: 'since the World Summit on Sustainable Development, there has been growing recognition of the connection between environmental protection and human rights', cf. E/CNo.4/2005/96, p.2

<sup>17</sup> The list includes the constitutions of: Afghanistan Andorra, Angola, Argentina, Armenia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Cambodia, Capo Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Ethiopia, Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Moldova, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Palau, Palestine, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia and Zambia.

<sup>18</sup> Cf. e.g. UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> Session, Review of Further Developments in the Fields with which the Sub-Commission has been concerned, Human Rights Environment, Final Report prepared by Fatma Zohra Ksentini, Special Rapporteur, E/CNo.4/Sub.2/1994/Conv. 1, 13 (1994).

<sup>19</sup> Cf. Charter on Human Rights and Peoples' Rights, 21 ILM 1982, 52, entered into force 21 Oct. 1986, at Article 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador,' O.A.S. Treaty Series No. 69 (1988), at Article 11; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 38 ILM 1999, 517, hereinafter Aarhus Convention, entered into force on 30 October 2001, at Article 1.

<sup>20</sup> ECE/CEP/43 adopted on 25 June 1998 by the United Nations Economic Commission for Europe and entered into force on 30 October 2001. The Convention was prepared in the framework of the UN Economic Commission for Europe and to date has 40 signatories and 36 ratifications.

<sup>21</sup> To this end, Article 1 makes express reference to 'the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'. Furthermore, the Preamble to the Convention expressly elaborates the idea that 'every person has the right to live in an environment adequate to his or her well-being and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

<sup>22</sup> Cf. Article 1: 'Each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention'.

<sup>23</sup> The only human rights treaty of universal application making reference to environmental protection, the Convention on the Right of the Child, makes only a *passim* reference to it and does not embody a distinct right to a healthy environment. Cf. Convention on the Rights of the Child, UN. Doc. A/44/49 (1989), entered into force

protection to the environment may result in the violation of some human rights whose realisation depends upon certain environmental characteristics. A number of human rights have been invoked to vindicate environmental abuses, in an attempt to *mobilise* and interpreting them to address environmental issues, which could not have been anticipated when they were formulated. Thus the implementation of existing human rights obligations may ensure better environmental protection, as a *logical corollary of human rights protection*.<sup>24</sup>

### ***The Convention system and the admissibility criteria of access to the Court***

The European Convention for the Protection of Human Rights and Fundamental Freedoms is one of numerous international instruments aimed at the protection of human rights. It was prepared within the framework of the Council of Europe and to date it has been ratified by 46 countries, including all Member States of the European Union.<sup>25</sup>

The Convention is regarded as the Council of Europe's most significant achievement in the defence and promotion of human rights, democracy and the rule of law. It sets out a list of rights and freedoms that Parties are obliged to guarantee to everyone within their jurisdiction. The Convention is assisted by a Court empowered to ensure the observance of the engagements undertaken by its Parties. The declaration of a violation of the Convention has the effect of imposing legal obligations on respondent States to put an end to the breach and restore the pre-existing situation.<sup>26</sup> The unique feature of the system, distinguishing it from other human rights treaties, is that, if this is not possible, the Court may also award *just satisfaction* to the injured party.<sup>27</sup> This confers on the Court far more persuasive powers than its homologues, both in the perspective of redress to victims and pursuit of compliance. In this way the Court operates to supplement national measures and as a stimulus to preemptive action by States in order that they fulfill their co-operative obligation.

The Court may be accessed both by States and individuals. In order to bring a claim to the Court, the latter need to be in a position to consider themselves *victims* of a violation of one of the rights listed in the Convention.<sup>28</sup>

According to the Court's established case law, the term *victim* denotes '*the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice*'.<sup>29</sup> Applicants must be victims at the time of application, proving a sufficient link with a violation of the

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Sept. 2 1990, at Article 24: 'State parties will pursue the full implementation of this right (the right to health) taking into consideration the dangers and the risks of environmental pollution'.

<sup>24</sup> Cf. M. ANDERSON, Human Rights Approaches to Environmental Protection: an Overview, in M. ANDERSON, A. BOYLE eds., Human Rights Approaches to Environmental Protection, Oxford, 1996, p. 8.

<sup>25</sup> To the date of writing, the State Parties to the Convention are: Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; The former Yugoslav Republic of Macedonia; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Moldova; Monaco; The Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; San Marino; Serbia and Montenegro; Slovakia; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine; United Kingdom.

<sup>26</sup> Article 46 of the Convention.

<sup>27</sup> Article 41 of the Convention.

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, Article 19.

<sup>29</sup> *Amuur v. France*, Application No. 19776/92, at 36.

Convention. The term *individual* refers to ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.’<sup>30</sup> The system does not allow *actio popularis*<sup>31</sup> and associations may submit claims only if they can prove to have directly suffered a violation of one of the rights listed in the Convention that is applicable to them.<sup>32</sup>

There are no restrictions as to the nationality of applicants, but the violation must be imputable to a State that has ratified the Convention and, equally, applicants must be within the jurisdiction of one Contracting Party. However, the Court’s jurisdiction extends also to extra-territorial acts carried about by State agents, provided that they exercised either *authority* or *control* over the individual or the territory at issue, (competence *ratione loci*).<sup>33</sup>

The exercise of the right of individual petition may not aim to prevent a violation of the Convention. Only in exceptional circumstances may the mere risk of violation confer the status of victim on an individual applicant, namely in presence of reasonable and convincing evidence of the occurrence of a violation concerning him or her personally.<sup>34</sup> The existence of prejudice is relevant only to the purpose of compensation.

The ratification by all States of Protocol No. 14 to the Convention will substantially amend the admissibility criteria of access to the Court. The implementation of the Protocol will allow the Court to declare inadmissible the claims of applicants who *have not suffered a significant disadvantage*, as far as the case has been duly considered by a domestic tribunal and unless respect for human rights requires examination of the application on the merits.<sup>35</sup>

The system is *subsidiary* to the operation of domestic remedies and the primary responsibility for the protection of human rights falls on national authorities. Thus in order to access the Court, applicants are required to have previously exhausted the domestic remedies available to pursue breaches of their rights under the Convention.<sup>36</sup> However, this requirement may be waived in absence of adequate and effective domestic remedies.<sup>37</sup>

Applications need to be filed within a period of six months from the date on which the final domestic decision was taken (competence *ratione temporis*). The Court does not consider anonymous applications or applications pertaining to matters that are substantially the same as those already examined by the Court or through another procedure of international litigation.

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<sup>30</sup> Ibidem, at 34.

<sup>31</sup> Klass and others v. Germany, Application No. 5029/71, at 33.

<sup>32</sup> Such as, for instance, the right to a fair trial, (cf. Gorraiz Lizaraga and others v Spain, Application No. 62543/00), but not the right to respect of their home and family life, (cf. Asselbourg v Luxembourg, Application No. 29121/95).

<sup>33</sup> Loizidou v Turkey, Application No. 15318/89, at 52.

<sup>34</sup> Cf. for example Soering v UK, Application No. 14038/88; Dudgeon v UK, Application No. 7525/76; Norris v Ireland, Application No. 105871/83, Modinos v Cyprus, Application No. 15070/89.

<sup>35</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series, No. 194, 13 May 2004.

<sup>36</sup> Cf. Article 35 of the Convention.

<sup>37</sup> Cf. Yasa v Turkey, Application No. 22495/93, at 77.



Judgments declaring a violation of the Convention have the effect of imposing on the respondent State a legal obligation to put an end to the breach and to take the measures it considers most appropriate to restore the pre-existing situation (*restitutio in integrum*).<sup>38</sup> If this is not possible, the Court may award *just satisfaction* to the injured party.<sup>39</sup> The term *just satisfaction* refers to measures that remedy a breach of an obligation in order to ‘*afford the injured party such satisfaction as appears to it to be appropriate*’ when there is no possibility for restitution.<sup>40</sup> In urgent cases, the Court may resort to special interim measures ‘*in the interests of the parties or of the proper conduct of the proceedings before it*.’<sup>41</sup> The measures may be adopted by a Chamber of the Court or by its president, at the request of a party or of any other person concerned, but may also be prompted by the Court *proprio motu*. The deployment of interim measures is subordinate to the establishment of a *prima facie* case under the Convention and to the existence of the threat of imminent and irreparable harm of a very serious nature. In such circumstances, State Parties must comply with the measures and refrain from any act or omission that could ‘*undermine the authority and effectiveness of the final judgment*.’<sup>42</sup>

The judgments of the Court are essentially declaratory<sup>43</sup> and, in line with the *subsidiariness* of the system, the Court does not have powers to proceed to the implementation of its decisions, which is left to domestic authorities. Nevertheless, when States fail to take action, the Court has undertaken the practice of commenting on systematic violations of the Convention.<sup>44</sup> Furthermore, according to the new regime that will come into force with the ratification of Protocol No. 14 to the Convention, the Committee of Ministers of the Council of Europe will be empowered to refer recalcitrant States to the Court.<sup>45</sup>

### ***The debate within the Council of Europe***

The European Convention of Human Rights does not provide a right to a clean environment. Over the years, however, the Council of Europe has promoted some key instruments for international environmental law<sup>46</sup> and environmental protection is one of its areas of action. A first suggestion for the inclusion of *the right to a healthy and viable environment* in the Convention came in 1999, when the Parliamentary Assembly of the Council of Europe proposed to ‘*consider the feasibility of drafting an*

<sup>38</sup> Cf. *Scozzari Giunta v Italy*, Application No. 39221/98 and 41963/98, at 249: ‘a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects’.

<sup>39</sup> *Ibidem*, at 250.

<sup>40</sup> *Papamichalopoulos v. Greece* Application No. 14556/89, at 34.

<sup>41</sup> Rules of the Court No. 39. For an example of the employment of such measures, cf. *Soering v UK*, Application No. 14038/88 and, more recently, *Ocalan v Turkey*, Application No. 46221/99.

<sup>42</sup> Cf. *Mamatkulov and Abdurasulovic v. Turkey* [GC], Application Nos. 46827/99 and 46951/99, at 110.

<sup>43</sup> Cf. *Assanidze v Georgia*, Application No. 71503/01, at 202.

<sup>44</sup> Cf. for instance to the Court’s attitude towards the length of proceedings in Italy, as it established that there was a practice in violation of the Convention, cf. *Bottazzi v Italy*, Application No. 34884/97, at 22.

<sup>45</sup> Cf. Article 16 of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004.

<sup>46</sup> Cf. Convention on the Conservation of European Wildlife and Natural Habitats, 1979, E. T. S. 104; IEL-MT 979: 70; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment: Lugano, ETS No. 150, not in force, 21.VI.1993; Convention on the Protection of the Environment through Criminal Law (Strasbourg, 1998). ETS No. 172, Strasbourg, April 11, 1998.

*amendment or an additional Protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment.’<sup>47</sup>*

The Committee of Ministers, however, rejected the suggestion, as at that time ‘*the conditions were not ripe to initiate a study geared to drawing up such a right for inclusion in an additional Protocol to the European Convention on Human Rights*’.<sup>48</sup> In this regard, the Committee pointed out that other international instruments pertaining to the enforcement of environmental law, such as the Convention on the Protection of the Environment through Criminal Law, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Aarhus Convention had not yet entered into force.

In 2003, after the entry into force of the Aarhus Convention, a new report of the Council of Europe Committee on the Environment, Agriculture and Local and Regional Affairs suggested the preparation of an additional Protocol to the European Convention, containing express recognition of a right to a healthy, viable and decent environment.<sup>49</sup> This suggestion was endorsed by the Parliamentary Assembly, which expressly called for the Committee of Ministers to ‘*draw up an additional Protocol to the European Convention on Human Rights concerning the recognition of individual procedural rights intended to enhance environmental protection, as set out in the Aarhus Convention*’.<sup>50</sup> The Recommendation further requested the Committee to draw up an instrument setting out the ways in which the European Convention on Human Rights provided individual protection against environmental degradation.<sup>51</sup>

The suggestion was unfavourably received by the Council of Europe Committee on Legal Affairs and Human Rights, which warned that ‘*adding an individual right to a healthy, viable and decent environment to the European Convention could turn out to be counter-productive*’, as the formulation and implementation of such a right posed questions that seemed of difficult, if not impossible solution.<sup>52</sup>

This *caveat* did not remain unheard and was fully endorsed by the Committee of Ministers.<sup>53</sup> Although they acknowledged the importance of a healthy, viable and decent environment to the protection of human rights, the Ministers did not consider it appropriate to draft an additional Protocol to the Convention. They agreed with the Committee that the Convention system already *indirectly* contributed to the protection of the environment through existing rights and their interpretation in the case law of

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<sup>47</sup> Recommendation 1431, adopted on 4 November 1999, published in Official Gazette of the Council of Europe, November 1999.

<sup>48</sup> Reply to Recommendation 1431, adopted by the Committee of Ministers on 15 November 2000.

<sup>49</sup> Document 9791 of the Parliamentary Assembly of the Council of Europe, 16 April 2003. EDOC 9791.

<sup>50</sup> Recommendation 1614 (2003), 27 June 2003, at 10.

<sup>51</sup> Ibidem, at 10.

<sup>52</sup> Opinion of the Committee on Legal Affairs and Human Rights, Doc. 9833, 19 June 2003, EDOC 9833, at 3. The Committee furthermore observed that: ‘If we give citizens a broadly formulated individual right to a healthy environment without being more specific as to the basis on which and against whom a citizen can in fact make a claim arising from that right, it becomes difficult for a judge to adjudicate. For what can the – already overloaded – Court in Strasbourg do if a citizen complains that the air or the water in his country is polluted, citing against the respondent state his or her general right to a healthy environment? The Court would not be able to condemn the respondent government in a general way and would in most cases have no guidelines as to the specific measures it could require of that country. The broadly formulated right does not define them, with the result that the type and extent of remedy cannot clearly be determined. It would thus be impossible to evaluate execution of judgments.’ Cf. also ibidem, at 5.

<sup>53</sup> Reply of the Committee of Ministers to Recommendation 1614 (2003) of the Parliamentary Assembly, adopted at the 869<sup>th</sup> meeting of the Ministers’ deputies on 21 January 2004.

the European Court of Human Rights.<sup>54</sup> The Committee further Stated that the Court's jurisprudence was *likely* to continue evolving, '*making it not advisable to draft an additional Protocol to the Convention along the lines set out in the Assembly's Recommendation*'.<sup>55</sup>

The Committee, however, recognised that action needed to be taken in order to seek '*new ways in which the human rights protection system can contribute to the protection of the environment*'.<sup>56</sup> Accordingly, it gave mandate to the Steering Committee of Human Rights to draft an instrument *recapitulating the relevant rights as interpreted in the Court's case-law* and emphasising the need to strengthen environmental protection at national level, '*notably as concerns access to information, participation in decision-making processes and access to justice in environmental matters*'.<sup>57</sup>

The result of this work was approved by the Committee of Ministers in January 2006, with the publication of the *Manual on Human Rights and the Environment, containing the principles emerging from the case law of the European Court of Human Rights*.<sup>58</sup> The Manual's declared aim is to '*raise awareness of the existing case-law of the Court in environmental matters and of the need to strengthen the protection of the environment at national level (...), helping potential applicants to better assess whether their claims relating to the environment would be arguable before the Court*'.<sup>59</sup>

The Manual's introduction highlights the link between the protection of human rights and the environment, stating that the two are '*mutually reinforcing*'<sup>60</sup> and emphasising that '*effective enjoyment of the rights which are encompassed in the Convention depends notably on a sound, quiet and healthy environment conducive to well-being*'.<sup>61</sup> The Manual does not *affect member States' current obligations* and explicitly recalls that the principle of subsidiariness is particularly important in the context of environmental matters.<sup>62</sup>

With the Manual the Committee of Ministers seems to have endorsed the line taken with the new jurisprudence of the Court, attempting to systematise it. This may prove a turning point in the pursuit of environmental interests, making of the Court a subsidiary remedial mechanism for the protection of the environment in the Member States of the Council of Europe. Set aside the perspective of introducing a specific human right to a healthy environment, the Committee of Ministers has therefore left it to the Court to establish the circumstances under which environmental interests may obtain protection within the framework of the Convention. The present paper will

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<sup>54</sup> Opinion of the Steering Committee for Human Rights, adopted at the 56th Meeting of the Committee in Strasbourg, on 18-21 November 2003.

<sup>55</sup> Ibidem, at 4.

<sup>56</sup> CM/860/21012004, adopted on 23 January 2004.

<sup>57</sup> Ibidem.

<sup>58</sup> Manual on Human Rights and the Environment, containing the principles emerging from the case law of the European Court of Human Rights, available on [www.coe.int](http://www.coe.int).

<sup>59</sup> Cf. Final Activity Report of the 61<sup>st</sup> Meeting of the Steering Committee for Human Rights on Human Rights and Environment, p.2.

<sup>60</sup> Cf. Manual, p. 1.

<sup>61</sup> Cf. Manual, p. 2.

<sup>62</sup> Ibidem.

seek to shed some light on the steps taken by the Court in this direction, starting from its early case law.

### ***The Court's initial approach: the early case law***

As mentioned earlier in this paper,<sup>63</sup> although the European Convention of Human Rights does not contain any explicit reference to the environment or to environmental rights, its Court has increasingly found itself dealing with applications presenting clear environmental features. In this connection, two different scenarios may be configured. The human rights protected by the Convention may be *directly affected* by adverse environmental factors *or* the protection of the environment may be regarded as a general interest justifying interference in the exercise of some human rights.

In the first perspective, the provisions susceptible of being directly affected by environmental conditions are the right to life (Article 2), to respect for private and family life, home and correspondence (Article 8) and to the peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the Convention). The procedural guarantees offered by the right to a fair trial (Article 6) and to effective remedy (Article 13) may also be called into question for the protection of environment interests.

In the second perspective, on several occasions the Court has established that environmental interests may offer legitimate grounds for interference with rights enshrined in the Convention, especially with reference to the right to respect for private and family life, home and correspondence and the right to the peaceful enjoyment of possessions.<sup>64</sup>

The present Author considers that the analysis of this jurisprudence has little effect on the assessment of the range of remedies that the European Convention of Human Rights may offer to the protection of environmental interests. The cited case law therefore will not be analyzed in this paper,<sup>65</sup> which will instead focus on cases where the protection of Convention rights requires a certain quality in environmental conditions.

Initially the Court had a fairly restrictive approach to this kind of claims and applications based on these grounds were rejected as incompatible with the Convention *ratione materiae*. In the words of the Commission, '*no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention*'.<sup>66</sup>

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<sup>63</sup> Cf. p. 7.

<sup>64</sup> Thus in the case of *Fredin v Sweden*, the Court found that the revocation of a licence to exploit a gravel pit on the applicant's property represented a justified interference with his proprietary rights for reasons of public interest, acknowledging that 'in today's society the protection of the environment is an increasingly important consideration'. Cf. *Fredin v Sweden*, Application No. 12033/86, at 48.

<sup>65</sup> For a detailed analysis of this case law, cf. D. GARCIA SAN JOSÉ, *Environmental Protection and the European Convention on Human Rights*, Strasbourg, 2005.

<sup>66</sup> *Kyrtatos v. Greece*, Application No. 41666/98, at 52.

The first claim touching upon environmental interests to be declared admissible by the Strasbourg institutions was that of *Arrondelle v UK*.<sup>67</sup> On that occasion, the applicant complained that the noise produced by Gatwick airport and a nearby motorway seriously affected her health, breaching her right to respect for her home and private and family life. She further complained that domestic law prevented her from acting in nuisance, which was prohibited for noise caused by aircraft in flight or aerodromes. This limit, the applicant maintained, constituted a violation of her rights under Articles 6 and 13 of the Convention. Mrs. Arrondelle also submitted that the domestic authorities' refusal to grant her a permission to change the destination of the premises, from domestic to commercial, did not allow her to sell the house at a reasonable price, affecting her rights under Article 1 of Protocol No. 1 to the Convention. The Commission declared the application admissible, but the case was settled and was never decided on its merits.

The first claim bearing some environmental implications to reach the Court was another *noise pollution* case. In *Powell and Rayner v UK*<sup>68</sup> the applicants lived near Heathrow airport and claimed that the noise pollution caused by aircraft amounted to a violation of the rights under Article 8 and Article 1 of Protocol No. 1 to the Convention. The applicants further complained that they had not had any access to effective domestic remedies, with breach of their rights under Article 6 and 13. The Commission considered that the existence of large airports was necessary to the country's economic well-being and that the interference with the applicants' rights was legitimate and justified. In the other hand, the case was found to be admissible on grounds of Article 13.

The Court observed that Article 8 was *material* to the applicants' claim as the quality of their private life and the scope of enjoying the amenity of their homes had been adversely affected by the noise generated by Heathrow airport.<sup>69</sup> However, the Court gave a preponderant importance to the fact that the UK Government had adopted measures to minimise noise and compensate the affected subjects, in the pursuit of a legitimate aim. The Court found that domestic authorities had not failed to strike a fair balance between the interests at stake. In this respect, the Court added that '*this is an area where the Contracting Parties are to be recognised as enjoying a wide margin of appreciation.*'<sup>70</sup> Accordingly, the Court concluded that there had be no violation of Article 13.<sup>71</sup>

In its first decision on a case bearing substantial environmental implications the Court chose to grant a wide margin of appreciation to State authorities as to how best address the issue of noise pollution. The Court proved itself unwilling to enter into considerations relating to the merits of domestic policies, showing high deference to the national authorities' approach. This view seemed to make the way to Strasbourg very steep for environmental cases. In the following years, however, the Court would substantially revise its approach to the question.

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<sup>67</sup> *Arrondelle v UK*, Application No. 7889/97.

<sup>68</sup> *Powell and Rayner v UK*, Application No. 9310/81.

<sup>69</sup> *Powell and Rayner v UK*, at 40.

<sup>70</sup> *Powell and Rayner v UK*, at 44.

<sup>71</sup> *Powell and Rayner v UK*, at 45.

## 2. The use of Article 8 and the right to respect for one's home, private and family life

According to Article 8 of the Convention:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There will be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The general purpose of Article 8 is to secure a sphere within which every individual may freely pursue the fulfilment and development of his private life and physical well-being, extending to cover the sites where these take place. The norm protects the individual against arbitrary interference, both by public authorities and private individuals. Protection is not limited to the Anglo-American notion of privacy and confidentiality, but includes physical intrusion and other forms of immaterial interference, such as *noise, emissions and smells*.<sup>72</sup>

States should not only refrain from interfering with individual rights, but are also under the *positive obligation* to take active steps to safeguard them, particularly where interference derives from lack of legislation or monitoring on intrusive activities.<sup>73</sup> In this respect, the provisions under Article 8 have been interpreted as including a series of procedural guarantees requiring authorities to prevent violations and sanction those responsible.<sup>74</sup>

These rights are not absolute and allow for a series of limitations, as specified in the second paragraph of Article 8. Accordingly, when interfering with private or family life, national authorities must act *in accordance with domestic law* and for the *pursuit of a legitimate aim*. In addition, their decisions must be proportionate to this legitimate aim and a fair balance be struck between competing interests.

In assessing claims under this provision, the Court first of all considers whether the facts of the case may be said to pertain to one of the protected interests, *i.e.* home, private life, family life and correspondence. *Private life* refers to the intimate sphere of a person's physical, psychological and moral integrity, including relational and sexual life.<sup>75</sup> The notion of *family life* encompasses protection and respect for family relations based on biological ties, although *de facto* families are also included.<sup>76</sup> The concept of *home* has been interpreted to extend to spaces where a person's private and family life takes place, *i.e.* the home and places of residence in general, including the

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<sup>72</sup> Cf. *Moreno Gomez v Spain*, Application No. 4143/02, at 53.

<sup>73</sup> Cf. Manual on Human Rights and the Environment approved by the Committee of Ministers on 20 January 2006, p. 37.

<sup>74</sup> Cf. e.g. *McMicheal v UK*, Application No. 16424/90, at 87: 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.'

<sup>75</sup> Cf. *X and Y v The Netherlands*, No. 8978/80, at 22.

<sup>76</sup> Cf. *Hokkanen v Finland* Application No. 19823/92; *Boyle v UK*, Application No. 9659/82.

workplace.<sup>77</sup> The right to respect for the home not only includes the right to the physical area, but also to its quiet enjoyment. The protection of *correspondence* pertains to the protection of communication *lato sensu*.

Having identified the relevant interest, the Court goes on to establish the content of the States' obligations with reference to the specific facts of the case. These may entail a duty to abstain from interference (so-called *negative obligation*) or to establish means of protection (so-called *positive obligation*), even in relations between individuals.<sup>78</sup> In both contexts, the Court requires that States strike a '*fair balance between the competing interests of the individual and of the community as a whole*.'<sup>79</sup> The tests that the Court deploys to verify compliance with these two sets of obligations bear some significant differences.

When the Court envisages a breach of a *negative obligation*, the interference with the applicant's right is assessed in the light of the parameters listed under the second paragraph of Article 8. The Court typically proceeds to ascertain whether the interference was *in accordance with the law*, requiring a minimal standard for the legislation *de qua*, which needs to be *accessible* and formulated in an *intelligible manner*.<sup>80</sup> The Court then considers whether the interference pursued an *aim* that could be regarded as *legitimate* according to the list given in Article 8, which includes *national security, public safety and the economic well-being of the country*. The Court further establishes whether the interference was *necessary in a democratic society, i.e.* whether the State has struck a fair balance between the competing interests on the facts of the case. To this purpose, the Court may take into consideration the alternative means that could have been employed to protect the interest at stake; whether the aim pursued has been achieved; whether the decision process that led to the interference could be regarded as fair and whether its consequence were adequately monitored.<sup>81</sup>

On the other hand, when the Court considers that a *positive obligation* is at issue, it firstly proceeds to determine the content of the specific duty incumbent upon the State and only then assesses whether domestic authorities have complied satisfactorily with it. In this sense, the requirements of *respect* are not clear-cut and vary significantly from case to case. Additionally, the Court requires States to identify a *pressing social need* which justifies the interference. To this end, the listing of legitimate aims under Article 8 provides some guidance, but it is not attached with overarching importance.<sup>82</sup> In the context of positive obligations, therefore, States bear the additional burden of proving that they have exercised their powers with due respect of all the interests involved.

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<sup>77</sup> Cf. *Niemietz v Germany*, Application No. 13710/88, at 30 and, more recently, *Société Colas Est and others v. France*, Application No. 37971/97, at 40-41.

<sup>78</sup> *X and Y v The Netherlands*, Application No. 8978/80, at 23.

<sup>79</sup> Cf. *Powell Rayners v UK*, cit., at 41: 'Whether the (...) case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under graph 1 of Article 8 (art. 8-1) or in terms of an 'interference by a public authority' to be justified in accordance with graph 2 (art. 8-2), the applicable principles are broadly similar.'

<sup>80</sup> Cf. *Sunday Times v UK* (No. 1), Application No. 6538/74, at 49.

<sup>81</sup> Cf. P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, 2<sup>nd</sup> ed., 2005, p. 284.

<sup>82</sup> Cf. *Rees v UK*, Application No. 9532/81, at 37: 'in striking the balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision only refers in terms to "interferences" with the right protected by the first paragraph – in other words is concerned with the negative obligations flowing therefrom.'

For both sets of obligations, States enjoy *a certain margin of appreciation* in determining the steps to be taken to ensure compliance with their obligations, in compliance with the principle of *subsidiariness* assisting the Convention.<sup>83</sup>

The enjoyment of the right to respect for one's home, private and family life may be decisively impaired by environmental conditions and this is the provision of the Convention that has been more successfully deployed for the pursuit of environmental interests. The jurisprudence on this matter is well-established. In the years, the Court has found that severe environmental pollution such as excessive noise levels,<sup>84</sup> fumes, smells<sup>85</sup> and toxic emissions<sup>86</sup> may interfere with a person's peaceful enjoyment of his home, in such a way as to raise an issue under Article 8. The key precedent that marked the evolution in the Court's jurisprudence in this sense was the case of *López-Ostra v Spain*.

#### *López-Ostra v Spain*<sup>87</sup>

In *López-Ostra v Spain* the applicant was a Spanish citizen residing in Lorca. Mrs López-Ostra complained that the operation of a private plant for the treatment of liquid and solid waste within a distance of 12 meters from her home had resulted in a violation of her rights under Article 8 of the Convention.

The plant had been built in a residential area without the licence required by domestic legislation for activities causing nuisance. At its very opening, the release of gas, fumes and pestilential smells had caused *health problems* and *nuisance* to a number of local residents. The local authorities had evacuated the area and temporarily rehoused its inhabitants. As a result of the incident, the activities of the plant were partially restricted. Nevertheless, reports drawn by domestic environmental and health authorities established that the plant continued releasing *fumes, smells and emissions*, in breach of the standards prescribed by domestic regulations.

The applicant had filed a complaint with the local administrative court, asking for the closure of the plant. She argued that the operation of the plant unlawfully interfered with the enjoyment of her home, threatening her physical and psychological integrity, contrary to her constitutional rights. The applicant had argued that her daughter had been suffering from *nausea, vomiting, allergic reaction and anorexia*, which her paediatrician linked to the high pollution levels at her family home.<sup>88</sup> Also the applicant's nephew, who lived in the same premises, was diagnosed with pathologies related to the chronic absorption of the pollutants released by the plant.

The local administrative court rejected the applicant's claim, maintaining that the nuisance she suffered did not constitute a serious risk to her health and was not sufficient to infringe her constitutional rights. Mrs. López-Ostra appealed against this

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<sup>83</sup> Cf. retro, p. 6.

<sup>84</sup> *Hatton and others v UK*, App. No. 36022/97, cf. infra.

<sup>85</sup> *López Ostra v. Spain*, Application No. 16798/90, cf. infra.

<sup>86</sup> *Guerra and others v Italy*, Application No. 14967/89.

<sup>87</sup> *López Ostra v. Spain*, Application No. 16798/90.

<sup>88</sup> *López Ostra v. Spain*, at 19.



decision and further attempted to submit the question to the Spanish Constitutional Court, but both applications were rejected.

Meanwhile, the applicant's sisters-in-law had filed an administrative complaint and started criminal proceedings against the company running the plant, arguing that it had operated in breach of national regulations, committing environmental offences. Although the domestic courts had ordered the closure of the plant, their orders had been suspended and the relative proceedings were still pending as the European Court for Human Rights considered Mrs. López-Ostra's claim. In the meantime, the applicant and her family had permanently moved to another area of the city at their own expense.

Before the Court, Mrs. López-Ostra maintained that the local authorities' inactivity had resulted in a violation of her rights under Article 8. She also claimed that being compelled to live near the plant amounted to inhuman and degrading treatment under Article 3. The Government opposed these claims, submitting that the fact that the applicant had moved away from the area affected by nuisance excluded her status as a victim of a violation of the Convention. The Commission considered the case admissible only on grounds of Article 8, as the circumstances of the case were not as severe as to justify a claim under Article 3. The Court agreed with these findings, observing that '*naturally, severe environmental pollution may affect an individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*'.<sup>89</sup>

The Court observed that the operation of the plant raised serious issues on the respect of the applicant's home and family life, constituting an interference with her rights under Article 8. As the legitimacy of the operation of the plant was still under the consideration by the national courts, the Court did not pronounce itself on the matter. However, the Court asserted that, independently of the outcome of the domestic proceedings, it was within its competence to establish whether national authorities had taken the measures necessary to protect the applicant's rights.<sup>90</sup>

In this respect, the Court noticed that, although the plant was privately owned, the local council had subsidised it. Furthermore, it found that the local authorities were aware of the nuisance caused to local residents. In the Court's opinion, the measures taken to compensate for the applicant's distress for exposure to the nuisance produced by the plant had been too little. Domestic authorities had therefore played an active role in prolonging the nuisance suffered by the applicant, who had been forced to remedy the situation by moving at her own initiative. This set of circumstances inclined the Court to conclude that there had been a breach of the applicant's rights under Article 8.

The Court considered that the applicant had suffered relevant pecuniary loss due to the depreciation of her old flat, as well as the expense and inconvenience related to her relocation. Taken together with the distress and anxiety the applicant had suffered and the harm to her daughter's health, the Court awarded an equitable compensation of 4 millions pesetas, both as pecuniary and non-pecuniary damage.<sup>91</sup>

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<sup>89</sup> López-Ostra v Spain, at 51.

<sup>90</sup> López Ostra v. Spain, at 55.

<sup>91</sup> López-Ostra v Spain, at 65.

This decision marked an innovative opening to environment-related claims in the Court's jurisprudence. Although it did not expressly state whether the respondent State was under a positive obligation to protect the applicant's rights, the Court's reasoning clearly shows that the State had a positive duty to protect Mrs. López-Ostra and had failed to do so. The Court did not scrutinise the domestic legality of the interference since domestic proceedings were still pending at the time of its decision. Nevertheless, the Court established that the applicant had carried a disproportionate burden for the operation of the plant, which had not been duly compensated by domestic authorities.

The circumstances of the case differed significantly from those of *Powell and Rayner v UK*, as Mrs. López-Ostra was able to prove substantial inadequacy in the action taken by domestic authorities, whereas the same could not be concluded in the case of Messrs Powell and Rayner. The individual consequences to the applicant's personal sphere were also more serious in *López-Ostra v Spain*, as a result of the damage to her daughter's health. Additionally, the latter presented fairly localised conflicting interests, while the operation of Heathrow airport purportedly related to the economic well-being of the whole country.

The *López-Ostra v Spain* judgment seemed to set a threshold of acceptability for the burden that some community members were meant to carry for the common interest. The shift of responsibility for private nuisance operating in this decision would bear substantial implications for future case law under Article 8, opening the way to extensive positive obligations on the part of State Parties.

The decision, however, remained isolated for a few years, during which the Court delivered some controversial judgments on environment-related cases seeking to rely on other provisions of the Convention (cf. e.g. *Balmer-Schafroth and others v Switzerland*, *infra*, Chapter 4). In 1998 the Court took another crucial decision under Article 8, with the case of *Guerra and others v Italy*.

#### *Guerra and others v Italy*<sup>92</sup>

In *Guerra and others v Italy*, the applicants were 40 Italian citizens living near a chemical factory, complaining that domestic authorities' inertia in reducing pollution levels and hazards arising from the operation of a privately owned chemical plant had breached their rights to life and physical integrity and the quiet enjoyment of their home.<sup>93</sup>

The plant was classified as *high risk* under domestic law and released various toxic pollutants.<sup>94</sup> In the 70's an accident had caused 150 cases of acute poisoning in the neighbouring population. A subsequent expert report had found that the plant had been operating without the required Environmental Impact Assessment and that its equipment for emission treatment had not complied with domestic law. The plant had subsequently restricted its production to fertilisers and had been reclassified as *dangerous* under domestic law. Domestic authorities had issued orders prescribing a

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<sup>92</sup> *Guerra and others v Italy*, Application No. 14967/89.

<sup>93</sup> *Guerra and others v Italy*, at 35.

<sup>94</sup> Directive 82/501/EEC of the Council of the European Communities.

series of safety improvements to the plant. In 1994 the plant ceased to operate, save for the annexed power station and waste treatment facilities.

Back in 1985, some 420 local residents, including the applicants, had initiated criminal proceedings against 7 directors of the plant for offences relating to pollution caused by emissions from the factory and to non-compliance with a number of environmental protection regulations.<sup>95</sup> Only 2 of the directors had been convicted and ordered to compensate for the damage suffered by the civil parties. However, this decision had been overturned on appeal, by reasons of the delay and uncertainty associated with the implementation of the relevant domestic regulations, which were considered decisive to clearing the appellants of all charges.

In their application to the European Court of Human Rights the applicants submitted that the lack of practical measures to reduce pollution levels and the hazards related to the operation of the factory had breached their right to life, contrary to Article 2 of the Convention.<sup>96</sup> They also complained that the authorities' failure to inform them of the risks and of the procedures to follow in event of a major accident had breached their right to freedom of information under Article 10.<sup>97</sup>

The Commission declared the case admissible, observing that Article 10 *'should be interpreted as granting an actual right to receive information, in particular from the competent authorities, to persons from sections of the population which have been or may be affected by an industrial or other activity dangerous to the environment.'*

In their memorandum to the Court and at the hearing, the applicants further relied on Article 8 of the Convention, contending that the domestic authorities' failure to provide them with the relevant information had breached their right to respect for their home, private and family life.<sup>98</sup>

The Court disagreed with the extensive interpretation of Article 10 given by the Commission, finding that this provision did not impose any positive obligation upon States to collect and disseminate information of their own motion.<sup>99</sup> Nevertheless, the Court found that the applicants' claim was admissible under Articles 8 and 2. The Court established that the toxic emissions from the plant were capable of interfering with the applicants' right to respect for their private and family life.<sup>100</sup> The Court also observed that, although domestic authorities were not directly responsible for the emissions, they had failed to spread information which was material to the protection of the applicants' rights.<sup>101</sup> Consequently, the Court concluded there had been a breach of that provision and granted non-pecuniary damage in the amount of 10.000.000 Lira for each applicant.

The Court did not find it necessary to consider the matter also on grounds of Article 2. This finding was the object of two separate opinions, in which one dissenting judge observed that *'it may be the time for the Court's case-law on Article 2 to start*

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<sup>95</sup> Guerra and others v Italy, at 19.

<sup>96</sup> Guerra and others v Italy, at 35.

<sup>97</sup> Ibidem.

<sup>98</sup> Guerra and others v Italy, at 46.

<sup>99</sup> Guerra and others v Italy, at 53.

<sup>100</sup> Guerra and others v Italy, at 60.

<sup>101</sup> Ibidem.

*evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life’.*<sup>102</sup>

As in *López-Ostra v Spain*, the Court confirmed that *severe environmental pollution* might be relevant to the rights protected under Article 8, reiterating that State authorities may bear responsibility for interferences caused by private activities. In the present decision, the Court concluded that States’ positive obligations also included the dissemination of information that might enable individuals to assess the risks of living near a hazardous site.<sup>103</sup> In this regard, the Court confirmed its established line according to which the protection of private and family life may entail the right to access to information.<sup>104</sup> In the *Guerra* decision, however, the Court further recognised that public authorities have an obligation to secure a right to access to information in relation to environmental issues.<sup>105</sup> In the specific, the Court noted that the State authorities’ duty to protect the applicants included informing them of the risks to which they were exposed by living near a chemical factory.<sup>106</sup>

This feature would be confirmed in subsequent case law.<sup>107</sup> Nevertheless, the *Guerra* judgment remained isolated, as the Court adopted an increasingly restrictive approach to *environmental* claims.

A good example of the Court’s approach can be envisaged in the decision of *Asselbourg and others v Luxembourg*.<sup>108</sup> In that case, 78 Luxembourg citizens and the association *Greenpeace* had claimed that the nuisance produced by a newly-built steel plant had breached their rights under Article 8 of the Convention. The applicants had unsuccessfully tried to oppose the plant’s opening before domestic courts. In their submissions to the European Court of Human Rights, they had maintained that the operation of the plant had caused various forms of nuisance, including intolerable smells and ground contamination by heavy metals. The applicants claimed that the resulting *damage to the environment* had affected their quality of life and deprived them of the peaceful enjoyment of their homes (or of their registered office in the case of the association *Greenpeace*).<sup>109</sup> They further complained that they had not had access to a fair trial under domestic law, with breach of their rights under Article 6 of the Convention.

The Court considered that *Greenpeace* could not claim to be a victim of a breach of Article 8, as this provision did not apply to associations. As to the other applicants, the Court found that they had tried to use domestic proceedings to prevent a violation of Article 8, rather than to put an end to it. The Court repeated that the exercise of individual petition could not aim to prevent a violation of the Convention, save in exceptional circumstances, where applicants were to produce ‘*reasonable and convincing evidence of the probability of the occurrence of a violation concerning them personally: mere suspicions or conjectures are not enough.*’<sup>110</sup>

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<sup>102</sup> Cf. Dissenting Opinion of Judge Jambrek.

<sup>103</sup> *Guerra and others v Italy*, at 60.

<sup>104</sup> *Gaskin v UK*, Application No. 10454/83.

<sup>105</sup> *Öneryıldız v. Turkey*, at 90 and *Guerra and others v. Italy*, at 60.

<sup>106</sup> *Guerra and others v Italy*, at 60.

<sup>107</sup> *Case of McGinley and Egan v. UK*, Application. Ns. 21825/93; 23414/94, at 101.

<sup>108</sup> *Asselbourg and others v Luxembourg*, Application No. 29121/95.

<sup>109</sup> *Asselbourg and others v Luxembourg*, at 1.

<sup>110</sup> *Ibidem*.

On the facts of the case, the Court observed that the *mere mention of the pollution risks* did not justify the applicants' submission that they were victims of a violation of the Convention. The Court elaborated that, instead, applicants should have been able to assert, *arguably and in a detailed manner*, that '*for lack of adequate precautions taken by the authorities, the degree of probability of the occurrence of damage was such that it could be considered to constitute a violation of their rights, on condition that the consequences of the act complained of were not too remote.*'<sup>111</sup>

In the Court's opinion, the applicants had produced little evidence of the nuisance complained of and the causal link with harm to their quality of life. The Court furthermore noted that the applicants had not attempted to access the domestic remedies that would have enabled them to complain of the verifiable consequences to their health and quality of life resulting from the start of the steel production.<sup>112</sup> Accordingly, the Court declared the claim manifestly ill-founded.

In this decision, the Court took a fairly restrictive approach to the notion of victim. The standard of proof required was very high, as the Court was not satisfied with the mere possibility of damage in the applicants' personal sphere, rejecting their attempt to use the right of individual petition to prevent a violation, rather than to put an end to it. In this respect, the Court also seemed to require *detailed evidence* of the nuisance complained of, its *intensity* and its *causal link* with the applicants' quality of life. These criteria were applied to numerous other cases, particularly in the context of Article 6.<sup>113</sup> In the meantime, another *environmental case* gained the spotlight in 2001, with the case of *Hatton and others v UK*.

#### *Hatton and others v UK*<sup>114</sup>

The case of *Hatton and others v UK* concerned nuisance caused by the operation of Heathrow airport. As mentioned earlier in this paper,<sup>115</sup> the Court had already had occasion to pronounce itself on interferences with the rights under Article 8 caused by the operation of airports.<sup>116</sup> The case of *Hatton and others*, however, presented the peculiarity of dealing with the specific issue of the implementation of new flight regulations, which had allegedly led to an increase in the number of flights, with consequent sleep disturbance. As a consequence, the applicants claimed that they had suffered interference with their rights under Article 8, further complaining that they had not had access to an effective domestic remedy, contrary to Article 13 of the Convention.

According to the information before the Court, the drafting of the new flight scheme had been accompanied by a series of consultation papers and a research study on the health consequences of sleep disturbance. Some local authorities had also tried to oppose the implementation of the new scheme through judicial review.

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<sup>111</sup> Ibidem. Cf. also, *mutatis mutandis*, *Soering v. UK*, Application No. 14038/88, at 85.

<sup>112</sup> *Asselbourg and others v Luxembourg*, at 1.

<sup>113</sup> Cf. *infra*, Chapter 4.

<sup>114</sup> *Hatton and others v UK*, App. No. 36022/97.

<sup>115</sup> Cf. *retro*, p. 11.

<sup>116</sup> cf. *Baggs v. UK*, Application No. 9310/81; *Arrondelle v. UK*, Application No. 7889/97; *Powell and Rayner v. UK*, Application No. 9310/81, cf. *retro*, Chapter 1.

The applicants maintained that, after the implementation of the new scheme, the level of noise disturbance was significantly higher than recommended by the World Health Organization.<sup>117</sup> They asserted that the interference with their rights was not *necessary in a democratic society*, as the Government had not produced any assessment of the specific economic importance of night flights,<sup>118</sup> nor it had carried out adequate studies on the health impact of sleep prevention.<sup>119</sup>

The applicants further submitted that the interference with their rights was not *in accordance with the law*, as the new scheme had not been *accessible* and its consequences had not been *foreseeable*. Furthermore, the applicants maintained that the new regulations had not fulfilled the aim of keeping the levels of night nuisance below those set by previous regulations, as Stated in the preceding Consultation Paper.<sup>120</sup> By reference to the Court's decision in *Guerra and others v Italy*, the applicants also claimed that they had not had access to essential environmental information regarding the *extent of an environmental threat to their moral and physical integrity*, with consequent breach of their civil rights under Article 8.<sup>121</sup>

The Government submitted that the applicants were exposed to lower noise levels than applicants who had been unsuccessful in their complaints relating to the operation of Heathrow airport.<sup>122</sup> They further maintained that the operation of privately-owned airports was matter upon which the Court's established jurisprudence granted a wide margin of appreciation to national authorities.<sup>123</sup> Furthermore, the Government submitted that night flights were of fundamental importance to the economic well-being of the country<sup>124</sup> and that the night flight scheme had been tailored to meet the needs of the local population, as well as the funding of studies on sleep disturbance.<sup>125</sup>

The Court preliminarily distinguished the instant case from previous decisions relating to generic complaints on noise pollution caused by the operation of Heathrow airport, observing that the controversy related to the specific issue of the increase in night noise due to the implementation of the new regulatory scheme.<sup>126</sup>

The Court accepted that the facts of the case constituted an interference with the applicants' right to respect of their home and private life. The Court also acknowledged that the nuisance was not directly imputable to the British authorities as the airport was privately run. However, the Court established that domestic authorities still had the positive duty to protect the applicants' rights. In identifying the content of this duty, the Court observed that '*in the particularly sensitive field of*

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<sup>117</sup> Hatton and others v UK, at 76.

<sup>118</sup> Hatton and others v UK, at 78.

<sup>119</sup> Hatton and others v UK, at 77.

<sup>120</sup> Hatton and others v UK, at 80, '(the applicants) contended that, in order to be 'in accordance with the law', there must be protection in domestic law against arbitrary interference with the rights guaranteed by Article 8 § 1 of the Convention; the law must be accessible and its consequences must be foreseeable. These features were not present when the Government departed from its statement of policy 'not to allow a worsening of noise at night and ideally to improve it' (the 1993 Consultation Paper, graph 34) and was held by the High Court to have been 'devious' in its attempt to conceal the departure'.

<sup>121</sup> Hatton and others v UK, at 81.

<sup>122</sup> Hatton and others v UK, at 84.

<sup>123</sup> Hatton and others v UK, at 86.

<sup>124</sup> Hatton and others v UK, at 88.

<sup>125</sup> Hatton and others v UK, at 85.

<sup>126</sup> Hatton and others v UK, at 94.

*environmental protection, mere reference to the economic well-being of the country would not be sufficient to outweigh the rights of others.’*<sup>127</sup>

The Court agreed with the applicants that the Government had not produced any assessment of specific economic benefits related to night flights and to the harm associated with sleep prevention, rather than sleep disturbance. In analysing the practical steps taken by the Government to mitigate night noise, the Court asserted that they had been ‘*too modest*’ to satisfy the positive obligation to protect the applicants’ rights.<sup>128</sup> Accordingly, the Court concluded that the Government had failed to strike a fair balance between competing interests, with violation of the applicants’ rights under Article 8.<sup>129</sup>

The Court further found that there had been a breach of the applicants’ rights under Article 13. In this regard the applicants had submitted that they had not had access to an effective remedy, as national legislation excluded resort to the tort of nuisance for noise caused by aircraft. The applicants maintained that the only remedy to which they could theoretically have resorted was judicial review. However, they protested that the scope of this instrument was limited to the grounds of irrationality, unlawfulness or unreasonableness, making it inadequate to addressing complaints under the Convention.<sup>130</sup> The Government, on the other hand, submitted that, as the applicants did not have an arguable claim under Article 8, they had no right to a remedy.<sup>131</sup> Even if the Court should conclude the contrary, the Government argued that the remedy of judicial review could be considered adequate to the purposes of Article 13.<sup>132</sup>

The Court found that, as the applicants had suffered for a breach of their right under Article 8, they evidently had an arguable claim under Article 13. The Court agreed on the unsuitability of judicial review as a remedy in accordance with Article 13 and concluded that there had also been a violation of the applicants’ right under this provision and awarded them £4.000 each for non-pecuniary damage.

In this decision the Court endorsed the line elaborated in *López-Ostra v Spain*, firmly placing on the State the onus to justify interference with the rights under Article 8 for activities carried out by third parties. In explicating the content of the State’s positive obligation, the Court seemed to go as far as to recognize an implicit duty to make use of Environmental Impact Assessment (EIA) procedures, as it observed that:

*‘States are required to minimise, as far as possible, the interference with these rights by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will in reality strike the right balance should precede the relevant project.’*<sup>133</sup>

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<sup>127</sup> Hatton and others v UK, at 97.

<sup>128</sup> Hatton and others v UK, at 106.

<sup>129</sup> Hatton and others v UK, at 107.

<sup>130</sup> Hatton and others v UK, at 110.

<sup>131</sup> Hatton and others v UK, at 111.

<sup>132</sup> Hatton and others v UK, at 112.

<sup>133</sup> Hatton and others v UK, at 98.

The Court exercised a close scrutiny on the domestic authorities' choices in their implementation of the obligations under Article 8. The legitimate aim pursued was not considered sufficient to justify the disproportionate burden that the applicants had carried on behalf of the whole community.

The Court's decision was welcomed as an opening to '*more generous compensation to be paid to those disproportionately affected by development, thus reflecting more fully the environmental costs of certain economic choices*'.<sup>134</sup> Indeed here the Court for the first time contested the merits of domestic policies, analysing in great details the measures deployed by national authorities. This was a revolutionary approach to *environmental claims*. The reaction to the decision was equally clamorous.

The case was referred to a Grand Chamber upon request of the British Government as *a serious question affecting the interpretation of the Convention*. In particular, the recurrent State argued that the Third Section's close scrutiny on domestic regulations had reduced to *vanishing point* the States' margin of appreciation in an area involving *difficult and complex balancing of a variety of competing interests and factors*.<sup>135</sup>

Before the Grand Chamber the applicants reaffirmed their initial submissions, maintaining that State authorities were to be allowed a narrow margin of appreciation in connection with the pervasive interference with the rights under Article 8 associated with sleep deprivation.<sup>136</sup>

The Grand Chamber preliminarily observed that, although the Convention did not include a right to a clean and quiet environment *ex se*, where individuals were directly and seriously affected by noise or other pollution, an issue might arise under Article 8.<sup>137</sup> The Court further stated that the same provision applied to *environmental cases*, both whether pollution was directly caused by the State or whether State responsibility rose from failure to properly regulate private industry.<sup>138</sup> In this context, the Court used the term '*environmental cases*' to refer to cases '*involving State decisions affecting environmental issues*'.<sup>139</sup>

As to the substance of the Governmental policies, the Grand Chamber asserted that the implementation of the new flight Scheme '*was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes*'.<sup>140</sup> The Court further found that, although the applicants had not submitted any evidence of the degree of discomfort they suffered, a study commissioned by domestic authorities had acknowledged that *sensitivity to noise* included a subjective element, a small minority of people being more likely than others to be woken or otherwise disturbed in their sleep by aircraft noise at night.<sup>141</sup> Consequently, the Court found that there had been an interference with the applicants' rights under Article 8.

<sup>134</sup> K. COOK, *Environmental Rights as Human Rights*, 2 *European Human Rights Law Review* 196 (2002), at 204.

<sup>135</sup> *Hatton and others v UK*, GC, at 88.

<sup>136</sup> *Hatton and others v UK*, GC, at 91.

<sup>137</sup> *Hatton and others v UK*, GC, at 96.

<sup>138</sup> *Hatton and others v UK*, GC, at, at 98.

<sup>139</sup> *Hatton and others v UK*, GC, at 99.

<sup>140</sup> *Hatton and others v UK*, GC, at 118.

<sup>141</sup> *Hatton and others v UK*, GC, at 118.



The Court did not consider it necessary to establish whether the facts of the case pertained to a breach of a negative or a positive obligation, pointing out that, in both cases, the question was rather whether a fair balance had been struck between the competing interests of the affected individuals and of the community as a whole.<sup>142</sup>

Making reference to previous cases in which environmental questions had given rise to violations of the Convention,<sup>143</sup> the Court emphasised that the violation had been predicated ‘*on a failure by national authorities to comply with some aspects of the domestic regime*’.<sup>144</sup> This element of domestic irregularity was deemed to be ‘*wholly absent*’ in the instant case and the Court further stressed that the applicants had not disputed the legality of the new flight scheme. It is however worth noticing that the latter finding was inaccurate as, in their submissions to the Chamber the applicants had expressly maintained that ‘*the interference with their rights was not in accordance with the law*’, due to the unintelligibility of the new regulations and the unpredictability of their effects.<sup>145</sup> These submissions had not been given detailed consideration by the Third Section and the Grand Chamber seemed to ignore them.

The Grand Chamber acknowledged that the country’s economic well-being represented a legitimate aim, in accordance with the second paragraph of Article 8. In this respect the Grand Chamber further observed that the economic importance of night flights could not be disputed. The Court remarked that, on the other hand, the applicants had not proved of having suffered any financial loss associated with the implementation of the new scheme. Additionally, they could have left the affected area and moved somewhere else, with no adverse consequences to the value of their homes.

The Court pointed out that the parties had displayed a different understanding of the national authorities’ margin of appreciation. On this issue, the Court asserted that, on the facts of the case, there was no reason to depart from the normal rule of deference to State s’ margin of appreciation, as ‘*it would not be appropriate (...) to adopt a special approach by reference to a special status of environmental human rights*’.<sup>146</sup> In the light of these considerations, the Grand Chamber concluded that no issues arose as to the substantial aspect of Article 8.<sup>147</sup>

On the procedural side, the Grand Chamber preliminarily observed that governmental decision-making process concerning *complex issues of environmental and economic policy* must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.<sup>148</sup> The Court was satisfied that the Government had carried about a consistent investigation in preparation of the flight scheme, which had been preceded by a public consultation and had been closely monitored in its implementation. Consequently, the Grand Chamber found that there had been no breach of Article 8 on the procedural side.<sup>149</sup>

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<sup>142</sup> Hatton and others v UK, GC, at 119.

<sup>143</sup> López-Ostra v Spain and Guerra and others v Italy

<sup>144</sup> Hatton and others v UK, GC, at 120.

<sup>145</sup> Hatton and others v UK, GC, at 80.

<sup>146</sup> Hatton and others v UK, GC, cit., at 122.

<sup>147</sup> Hatton and others v UK, GC, cit., at 127.

<sup>148</sup> Hatton and others v UK, GC, cit., at 128.

<sup>149</sup> Hatton and others v UK, GC, cit., at 129.

However, the Grand Chamber established that the case was *arguable* for purposes of Article 13 and, like the Third Section, equally considered that judicial review was inadequate to remedy the applicants' situation. Accordingly, the Grand Chamber ruled that there had been a breach of Article 13 without awarding any damage to the applicants, as it found that the decision in itself constituted adequate satisfaction for the non-pecuniary damage they had suffered.

The ruling was by a majority. In their lengthy opinion, the dissenting judges argued that there had been a violation of Article 8, maintaining that, although the Convention did not include a specific right to a clean environment, the question of environmental pollution was a *par excellence* issue for international law and that environmental protection *shared common grounds* with the general concern for human rights.<sup>150</sup>

The dissenting judges also criticised the majority's interpretation of the State's margin of appreciation. They considered that the disturbance suffered by the applicants was particularly severe, sleep deprivation having been acknowledged as an element of inhuman and degrading treatment in the Court's jurisprudence. Additionally, the dissenting judges observed that the fact that the applicants represented a small minority of the population residing near Heathrow airport made them deserve special protection and not the other way around.

Many commentators considered this decision a regress from the position taken in *López-Ostra v Spain* and *Guerra and others v Italy*, saluting it as the end of the Court's *special approach* to environmental rights<sup>151</sup> and as '*a step backward in terms of the development of human rights in the environmental context.*'<sup>152</sup>

The present author respectfully disagrees with this early reading of the Grand Chamber's decision. The *Hatton and others v UK* judgment did not close the Court's door to environmental claims, but simply set the pace of its future approach. An attentive reading of the decision reveals that here for the first time the Court took the opportunity to show that, for Article 8 to be applicable, the domestic legality of the disputed policy was to be attached with fundamental importance. This may seem a Statement of the obvious, given the wording of the second paragraph of Article 8. Nevertheless, the Court had not had occasion to elaborate on these matters in *Guerra and others v Italy* and *López-Ostra v Spain*. In the latter, the Court even abstained from pronouncing on the legality issue, albeit it must have indirectly taken it into consideration.

In *Hatton and others v UK*, the Third Section established that there had been a breach of Article 8 by reference only to one of the applicants' submissions, (*i.e.* the Government's failure to assemble the evidence as it would have been necessary for the decisions to be made on the basis of the relevant data), without analysing the others.<sup>153</sup> In particular, no specific consideration was given to the allegations concerning the domestic legality of the regulations, which were later found decisive

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<sup>150</sup> Cf. Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupan and Steiner.

<sup>151</sup> D. HART, M. WHEELER, Night flights and Environmental Human Rights, 16 Journal of Environmental Law 100, (2004).

<sup>152</sup> J. HYAM, *Hatton and others v UK* in the Grand Chamber: One Step Forward, Two Steps Back, 6 European Human Rights Law Review, 640 (2003).

<sup>153</sup> Cf. *Hatton and others v UK*, GC, at 42.

by the Grand Chamber. In this, the Grand Chamber seems to have taken the reasonable standpoint that, in matters having prevailing environmental relevance - and therefore not directly protected by the Convention *ex se* - the legality of domestic practices at the centre of the dispute must be granted priority importance.

As the new flight scheme did not display any *prima facie* arbitrariness, the Grand Chamber rightly attached relevance to the public consultations that had preceded its implementation, emphasising how the applicants had not presented any objections to it. Accordingly, the Court did not find that there were any issues as to the procedural correctness of the new regulations. The *ratio* of the Grand Chamber's reasoning may be easily traced to the *subsidiariness* principle assisting the Convention.

The Dissenting Judges and some early commentators seem to have exaggerated the significance of the fact that the applicant represented a very small minority of residents in the Heathrow area. If the British authorities ought to be criticised at all, it should have been for not providing any remedy for the characteristic way in which the applicants had been affected by the implementation of the regulations, (e.g. monetary compensation, rehousing on favorable terms, etc), rather than disputing the policy of allowing night flights at all. In this, both the Third section and the Grand Chamber were right in finding a violation of Article 13.

The fact that the applicants had not pointed to any specific pecuniary damage related to the implementation of the scheme and, equally, that they had failed to produce any specific evidence as to the damage to their health and well-being, were given crucial importance in the Grand Chamber's judgment. According to the Court's well-established jurisprudence, applicants do not need to prove damage in order to be considered *victims* in Convention terms.<sup>154</sup> Nevertheless, it seems that, in the context of the *environmental cases*, the Grand Chamber required that some form of prejudice be configurable. In other words, it seems that, faced with significant challenge of setting the requirements to identify a victim in the specific field of *environmental cases*, the Court concluded that lack of material prejudice, together with the procedural correctness and legality of the disputed policy, was material to the finding of a breach of Article 8.

The *Hatton* judgment synthesised most of the principles elaborated by the Court in environmental cases. All the key issues raised in the Grand Chamber decision - i.e. the domestic legality and the procedural correctness of the disputed policy, as well as the relevance of the personal impact on the applicants to constitute their status as victims - would face substantial developments in the following years.

### ***The 2004 evolution: the new case law under Article 8***

The *Hatton and others v UK* decision seemed to put a definitive halt to the pursuit of environmental interests through Article 8 of the Convention. This was confirmed in 2003 by the decision in *Kyrtatos v Greece*.<sup>155</sup> The applicants were two Greek citizens who owned a property near a natural reserve, arguing that the building of an urban development adjacent to their home had led to the destruction of their physical

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<sup>154</sup> Cf. *Amuur v. France*, Application No. 19776/92, at 36

<sup>155</sup> *Kyrtatos v Greece*, Application No. 41666/98.

environment, impairing their rights under Article 8.<sup>156</sup> In particular, the applicants complained that the area had lost its scenic beauty and changed profoundly in character from a natural habitat for wildlife to a tourist development. They further submitted that this deterioration of the environment had adversely affected their lives and that domestic authorities had failed to fulfill their positive duty to take reasonable and appropriate measures to secure their rights.

The Court considered that the deterioration of the natural environment and landscape were not pertinent to the interests protected under Article 8.<sup>157</sup> The Court clarified its view maintaining that the *crucial element* which must be present in determining whether environmental pollution adversely affected the rights under this norm was the existence of a *harmful effect on a person's private or family sphere* and not simply the general deterioration of the environment.<sup>158</sup> The Court further Stated that neither Article 8 nor any other Article of the Convention was specifically designed to provide general protection of the environment as, to that purpose, other international instruments and domestic legislation were more pertinent.<sup>159</sup>

Therefore, in the Court's opinion, although some disturbance could be associated with the urban development in the applicants' neighbourhood, this had not reached *a sufficient degree of seriousness* to be taken into account for purposes of Article 8.<sup>160</sup>

This decision confirmed the Court's strict interpretation of the victim requirement in connection with environmental cases, requiring that applicants prove *immediate* and *considerable prejudice* in order to constitute their claims. In 2004, however, this line saw substantial development in *Taskin and others v Turkey*.

*Taskin and others v Turkey*<sup>161</sup>

In *Taskin and others v Turkey* the applicants were 10 Turkish nationals complaining that the operation of a mine had forced them to suffer the consequences of environmental damage, threatening human health, wildlife and water supplies, with breach of their rights to life and respect of their home and family life. The applicants also claimed that they had not been able to access effective judicial protection, in breach of their rights under Articles 6 and 13 of the Convention.<sup>162</sup>

The mine was situated near the village where the applicants resided and operated gold extraction through cyanide leaching. According to the information before the Court, cyanide is an extremely toxic substance that, mixed with soil, water and air, becomes harmful to all living beings, presenting *considerable risk to human health and the environment*.<sup>163</sup> The mine had initially received permission to operate after a procedure including an environmental impact assessment (EIA) and public consultation.

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<sup>156</sup> *Kyrtatos v Greece*, at 44.

<sup>157</sup> *Kyrtatos v Greece*, at 52.

<sup>158</sup> *Ibidem*.

<sup>159</sup> *Kyrtatos v Greece*, at 52.

<sup>160</sup> *Kyrtatos v Greece*, at 54.

<sup>161</sup> *Taskin and others v Turkey*, Application No. 46117/99.

<sup>162</sup> *Taskin and others v Turkey*, at 13.

<sup>163</sup> *Taskin and others v Turkey*, at 26.

A number of local residents, including the applicants, had opposed the permit through judicial review. The Turkish Supreme Administrative Court had held that the permit conflicted with the State's obligation to protect the right to life and the right to a healthy environment enshrined in the Turkish Constitution. Accordingly, it had annulled the permit as contrary to *public interest*.<sup>164</sup> The Turkish executive, however, had issued a new permit, without requiring a new EIA. The mine had thereafter resumed its operations and never stopped since.

The applicants and other local residents had successfully sued for damage the Prime Minister and other members of the executive for failing to enforce the first decision of the Supreme Administrative Court. Additionally, they had also opposed the new permit through judicial review, leading to a legal dispute that was still pending at the time of the hearing in Strasbourg.

Before the Court the applicants submitted that, since the mine had started operating, they had suffered significant psychological distress associated with the risk posed to their health by the use of cyanidation. They further complained of the noise pollution associated with the *movement of people and use of machinery and explosives*. The applicants also maintained that, although the domestic courts had upheld their complaints, the executive had disregarded their decisions. In the light of these premises, the applicants asked the European Court of Human Rights to declare that the national authorities' decision to issue a permit to the operation of the mine, together with the related decision-making process, had given rise to a violation of their rights under Article 8 of the Convention.<sup>165</sup>

The Government disputed that there had been an interference with the applicants' rights, since the risk they had complained of was extremely remote and not susceptible of posing a real threat to them. The Government further argued that, even if the Court should find Article 8 to be applicable to the facts of the case, this interference was to be regarded as fully legitimate, justified and proportional.

The Court preliminarily recalled that severe environmental pollution might affect '*the individuals' well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life, without, however, seriously endangering their health*.'<sup>166</sup> The Court asserted that these considerations applied also to cases where the dangers of an activity had been determined in an environmental impact assessment, otherwise States' positive obligations to take reasonable and appropriate measures to secure the applicant's rights under Article 8 would have been set *at nought*.<sup>167</sup>

The Court relied on the findings of the Turkish Supreme Administrative Court to establish that the use of sodium cyanide represented a threat to the environment and to the right to life of the neighbouring population.<sup>168</sup> Accordingly, the Court asserted that there had been an interference with the applicants' rights.

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<sup>164</sup> Taskin and others v Turkey, at 26.

<sup>165</sup> Taskin and others v Turkey, at 100.

<sup>166</sup> López-Ostra v Spain, at 51. Cf. also Taskin and others v Turkey, at 110.

<sup>167</sup> Taskin and others v Turkey, at 110.

<sup>168</sup> Taskin and others v Turkey, at 109.

On the substantive side, the Court endorsed the Turkish Supreme Administrative Court's findings that the national authorities' decision to allow the operation of the mine had not served the public interest and had been contrary to the applicants' constitutional rights. The Court, however, did not draw any adverse conclusion from these facts and proceeded to examine the procedural correctness of the domestic authorities' conduct.<sup>169</sup>

In this regard, the Court observed that, although Article 8 did not include any explicit procedural guarantees, still the decision-making process leading to measures of interference had to be fair and capable of affording *due respect to the interests of the individual*.<sup>170</sup> The Court also recalled the principles established in *Hatton and others v UK*, asserting that the determination of *environmental* policies required appropriate *investigations and studies*<sup>171</sup> and emphasising the importance of *public access to information*.<sup>172</sup> The Court also recalled that access to court was necessary to the protection of the rights safeguarded by Article 8.<sup>173</sup>

The Court found that the executive authorities had disregarded the Turkish Supreme Administrative Court decision, allowing the operation of the mine without any substantial amendment to the material situation. The subsequent long dispute concerning the lawfulness of these measures '*was caused solely by the authorities refusal to comply with the courts' decisions and with domestic legislation*'.<sup>174</sup> The Court concluded that the State authorities' conduct had denied the guarantees provided by Turkish law of any effect, breaching their positive obligation to protect the applicants' rights.

The Court further established that failure to comply with the Supreme Administrative Court judgment had breached the applicant's rights under Article 6.<sup>175</sup> The Court did not find it necessary to consider the case also on grounds of Articles 2 and 13. The decision was unanimous and the applicants were granted 3,000 EUR each for non-pecuniary damage.

The Taskin case broke new grounds at several levels. This was the first decision after *Hatton and others v UK* in which the Court found a breach of Article 8 in connection with a claim involving substantial environmental interests. The breach of the applicants' rights was the result of lack of compliance with domestic regulations and the Court did not proceed to assess the adequacy of domestic standards, as they had not been implemented in the first place.

The Court relied heavily on the findings of domestic courts, both as to the risks posed by the operation of the mine and the finding that its operating permit '*did not serve the public interest*'. Translated in Convention terminology, this remark sounded as if the interference with the applicants' rights was not in accordance with the law and necessary in a democratic society. The Court, however, did not draw any conclusions from this point, preferring to proceed to the analysis of the case according to the

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<sup>169</sup> Taskin and others v Turkey, at 114.

<sup>170</sup> Taskin and others v Turkey, at 115.

<sup>171</sup> Taskin and others v Turkey, at 116.

<sup>172</sup> Taskin and others v Turkey, at 116.

<sup>173</sup> Taskin and others v Turkey, at 116.

<sup>174</sup> Taskin and others v Turkey, at 120.

<sup>175</sup> For the analysis of this limb of the decision, cf. *infra*, Chapter 4.

procedural guarantees under the Convention. Also in this respect, the Court attached preponderant weight to the fact that the breach of the applicants' rights had been established in several domestic decisions. In the Court's view, the executive authorities' refusal to comply with these judgments had shown contempt for the applicants' rights, amounting to a procedural breach of Article 8.

The most salient feature of the decision, however, lies in its effect on the victim requirement under Article 34 of the Convention.<sup>176</sup> Although the applicants did *not* sustain any actual damage to their health or property, the mere potential was sufficient to constitute a violation of their rights. This distinguishes the instant judgment from the circumstances of *López-Ostra* and *Guerra*, where actual episodes of intoxication had taken place.

The Court's change of attitude may be better appreciated by taking into account its established case law on analogous matters. In the past the Court had required that applicants be able to assert '*arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote*'.<sup>177</sup>

This attitude was well portrayed in the decision in *Tauria and others v France*,<sup>178</sup> where the applicants sought to oppose the resumption of atomic testing in French Polynesia, submitting that nuclear activity severely affected their life and health. The Commission struck out the claim, concluding that the applicants could not be regarded as victims under the Convention, as they had not produced any detailed evidence that the tests had affected them personally and directly. In the cases of *López-Ostra v Spain* and *Guerra and others v Italy*, the Court granted redress to applicants who could prove a breach of domestic standards *together with* some damage to their property and health. In the Taskin judgment, instead, the Court found that the breach of domestic standards was sufficient to encompass a violation of the applicants' rights, without requiring any proof of material prejudice. As recalled earlier in this paper, applicants may be considered victims under the Convention *also* in connection with the mere potential of damage to their personal sphere. Nevertheless, this was the first time the Court applied the preventive approach to an *environmental case*.

The Taskin judgment that the principles elaborated in the cases of *López-Ostra* and *Guerra* had not been overruled by the Grand Chamber's decision in *Hatton and others v UK*. On the contrary, it displayed a further enhancement of the protection of environmental interests under the Convention. This trend was confirmed by the Court's decisions in the following months.

#### *Moreno Gomez v Spain*<sup>179</sup>

In *Moreno Gomez v Spain*, the applicant lived in a residential neighbourhood crowded with nightclubs, causing disturbance to the local population. The applicant, who

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<sup>176</sup> *Fadeyeva v Russia*, at 88.

<sup>177</sup> *Asselbourg v Luxembourg*, Application No. 29121/95, at 1.

<sup>178</sup> *Tauria and others v France*, Application No. 28204/95.

<sup>179</sup> *Moreno Gomez v Spain*, Application No. 4143/02.

suffered sleep deprivation, insomnia and ‘*other serious health problems*,’ argued that domestic authorities were responsible for the noise, constituting a breach of her rights under Article 8.

Domestic authorities had tried to remedy the situation, banning the concession of new licences for the opening of nightclubs and categorising the area as *acoustically saturated*. The ban, however, had not been enforced and noise levels continued exceed the limits, a nightclub even receiving licence to operate in the very premises where the applicant lived. The domestic courts had later declared the licence invalid.

Ms Moreno Gomez had complained to the local authorities, seeking compensation for the damage suffered and the costs of installing double-glazing, relying upon the right to life and physical integrity and the right to privacy and inviolability of the home, as provided by the Spanish Constitution. Since the local authorities had not replied to her claim, Mrs. Moreno Gomez lodged an application for judicial review for breach of her constitutional rights. Her claim was however unsuccessful, as the domestic courts found that she had not established a direct link between the noise and the alleged damage, failing to prove a breach of her fundamental rights.

Before the European Court of Human Rights, Mrs. Moreno Gomez argued that the Spanish authorities’ inertia had contributed to the interference with her rights under Article 8. She further maintained that the interference with her right had been unjustified, as the area where she lived was categorised as residential and no fundamental interests prevented the effective enforcement of existing legislation.<sup>180</sup>

The Government maintained that they were not responsible for disturbance carried out by private parties and added that the local authorities had sought to remedy the acoustic pollution affecting the applicant’s place. Furthermore, they disputed that the applicant’s claim relied in principle on noise levels that had not been measured within her home, but in the entrance of the hall of residence where she lived.<sup>181</sup>

The Court preliminarily observed that Article 8 entails the quiet enjoyment of the home and that, in this respect, the breach of this right also includes non concrete or physical intrusions, *such as noise, emissions, smells or other forms of interference*.<sup>182</sup>

The Court noted that domestic authorities could not be regarded as the direct cause of the noise pollution affecting the applicant. However, the fact that the area where she lived had been designated *acoustically saturated* was considered sufficient to exempt her from having to prove a fact of which the authorities were ‘*already officially aware*.’<sup>183</sup> In the Court’s opinion, although the local municipality had taken some action to remedy the situation, they had tolerated continuing infringements of the standards set by domestic law, thus contributing to the practice of non-observance of the rules established to tackle the problems of night disturbance. The Court therefore found that domestic authorities had failed to protect the applicant’s rights under Article 8 and awarded 3.884 EUR for pecuniary and non-pecuniary damage.

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<sup>180</sup> Moreno Gomez v Spain, at 46.

<sup>181</sup> Moreno Gomez, v Spain, at 52.

<sup>182</sup> Ibidem.

<sup>183</sup> Moreno Gomez v Spain, at 59.



In this judgment the Court resumed the line adopted in *López-Ostra v Spain*, acknowledging a claim based on the breach of domestic regulations accompanied by material prejudice to the applicant's personal sphere. It is notable that, as in *López-Ostra*, the domestic courts had not offered any redress to the complaints of the applicant. There was accordingly a marked difference from the *Taskin* case, where the executive had disregarded the domestic courts' decision. In this respect, the Court seems to have instituted a twofold approach: it was ready to go against the domestic courts' assessment in cases of actual prejudice to the applicants' personal sphere, while it was reluctant to depart from it in cases of pure moral distress - e.g. *Balmer-Schafroth and others v Switzerland*,<sup>184</sup> *Asselbourg and others v Luxembourg*.<sup>185</sup>

In *Moreno Gomez v Spain*, the Court further acknowledged that noise pollution is a source of interference relevant for the purposes of Article 8. In this respect, the Court was not satisfied by the mere predisposition of standards in domestic legislation and demanded also their effective implementation. This approach would see a further evolution in the following year, with the revolutionary decision of the case of *Fadeyeva v Russia*.

*Fadeyeva v Russia*<sup>186</sup>

In the *Fadeyeva* case, the applicant complained of a violation of her rights under Article 8 in relation to domestic authorities' failure to resettle her outside of the sanitary security zone of an iron smelter.<sup>187</sup>

Mrs. *Fadeyeva* lived in the sanitary security zone of the largest iron smelter in Europe. The factory produced vast amounts of pollutants, breaching domestic safety regulations and severely impacting the life and health of local residents. Since the Soviet era, domestic legislation prohibited any human settlement within a distance of 1 km from the smelter (the so-called sanitary security zone), in order to isolate it from residential areas and reduce its impact on the health of local population. However, at the date of the proceeding, approximately 150.000 people, including the applicant, lived in the housing situated therein. The local concentration of toxic substances consistently exceeded the levels set by national legislation and the morbidity rate was higher than average.<sup>188</sup> The highest levels of contamination were registered in the residential districts immediately adjacent to the plants, where Mrs. *Fadeyeva* lived.

According to domestic law, the authorities could discontinue the operation of a plant whose management failed to create a sanitary security zone in accordance with the law.<sup>189</sup> However, there was no requirement for the resettlement of local residents in the case of plants already in operation before the passing of the law.<sup>190</sup> In general, domestic legislation allowed the population to live temporarily in environmentally unfavorable territories, if State or public interests required that economic or other activities be conducted there.<sup>191</sup>

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<sup>184</sup> Cf. *infra*, Chapter 4.

<sup>185</sup> Cf. *retro*, p. 19.

<sup>186</sup> *Fadeyeva v Russia*, Application No. 55723/00, decided on 9 June 2005

<sup>187</sup> *Fadeyeva v Russia*, at 108.

<sup>188</sup> *Fadeyeva v Russia*, at 12.

<sup>189</sup> *Fadeyeva v Russia*, at 56.

<sup>190</sup> *Fadeyeva v Russia*, at 54.

<sup>191</sup> Article 10 § 5 of Cherepovets Planning Code of 1998, cf. *Fadeyeva v Russia*, at 55.

Mrs. Fadeyeva lived in a flat that had been assigned to her husband under a special scheme of life-long tenancy. After the Soviet period, the housing had passed to the control of the local municipality, functioning *de facto* as council homes. Tenants of the dwellings paid a rent substantially lower than market rate and had full right to use and control of the property. According to domestic legislation, tenants whose living conditions did not correspond to the required standards were eligible to be placed on a waiting list for new council housing.<sup>192</sup>

In 1995 Mrs. Fadeyeva and other residents of her apartment block had brought a court action seeking resettlement outside the sanitary security zone. They claimed that the conditions of the neighbourhood where they lived were *unfavorable for humans* and potentially dangerous to health and life. They maintained that local planning regulations imposed an obligation on the plant's owner to resettle them to an ecologically safe area.<sup>193</sup>

The domestic courts acknowledged that Mrs. Fadeyeva's home was situated within the sanitary security zone and that she had a right to be resettled. However, they did not order her resettlement, but simply instructed the local authorities to place her on a *waiting list* to obtain new local authority housing.<sup>194</sup> In this regard, council authorities had no obligation to provide a timetable for resettlement and it was submitted that the first person on the waiting list for Mrs. Fadeyeva's area had been there since 1968.<sup>195</sup>

The applicant later sought execution of the judgment, relying on her rights to respect for her private life and home, as guaranteed by the European Convention of Human Rights, to which Russia became a party in 1998. The applicant further relied on the Russian Constitution, which expressly provides for a *right to a favorable environment* and the *right to compensation for damage to health or property by ecological offences*.<sup>196</sup> Her application was, however, dismissed as the domestic courts were satisfied that the judgment had been executed since the applicant had been placed on a waiting list.<sup>197</sup> To the date of proceedings in Strasbourg, the question of the resettlement of the inhabitants of the dwellings where the applicant lived remained unsettled.

The applicant turned to Strasbourg, asserting that the operation of a steel plant in close proximity to her home endangered her health and well-being, as protected by Article 8.<sup>198</sup> In her initial submissions Mrs. Fadeyeva had also sought to rely on Articles 2, 3 and 6 of the Convention. These claims, however, had been rejected as manifestly ill-founded, as the applicant did not face any '*real and immediate risk*' either to her physical integrity or her life and the alleged detriment she suffered could not be said to raise any issues under Articles 2 and 3. Furthermore, the Court also refused to consider the case under Article 6, as it found that the applicant had been afforded ample opportunity to State her case before national courts. The Court took an

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<sup>192</sup> Housing Code of the RSFSR of 24 June 1983, cf. *Fadeyeva v Russia*, at 61.

<sup>193</sup> *Fadeyeva v Russia*, at 20.

<sup>194</sup> *Fadeyeva v Russia*, at 21.

<sup>195</sup> *Fadeyeva v Russia*, at 63.

<sup>196</sup> Article 42 of the Russian Constitution, cf. *Fadeyeva v Russia*, at 48.

<sup>197</sup> *Fadeyeva v Russia*, at 28.

<sup>198</sup> *Fadeyeva v Russia*, at 3.

analogous view in the cases of another 4 Cherepovets residents who lodged applications on grounds similar to those of Mrs. Fadeyeva.<sup>199</sup>

With specific reference to the claim under Article 8, the applicant argued that the Russian authorities had failed to protect her private life and home from the severe *environmental nuisance* caused by the steel plant, with detriment to her health and well-being.<sup>200</sup> Mrs. Fadeyeva maintained that the concentration of certain toxic substances near her home constantly exceeded the safety levels established by Russian law, pointing out that State authorities had not produced the data collected at the screening post 300 metres from her home, as she had specifically requested. She consequently proposed that the Court drew adverse inferences from the Government's failure to produce this evidence.<sup>201</sup>

The applicant also submitted that the plant's emissions included highly noxious substances<sup>202</sup> that, according to an expert report prepared for the applicant, exposed local residents to a range of serious diseases.<sup>203</sup>

As to the impact on her personal health, Mrs. Fadeyeva submitted a medical report stating that she suffered for various illnesses, such as neuropathy of the upper extremities and osteochondrosis, in recognition of which she had received early retirement and compensatory benefits. The report did not attribute any specific cause to the illnesses, but said that working in conditions of toxic pollution would *exacerbate* them. The applicant stressed that, if this were true with regard to her working conditions, which entailed exposure to toxic emissions only during working times, this was *a fortiori* applicable to permanent residence conditions.<sup>204</sup>

Mrs. Fadeyeva referred to recent domestic case law establishing the local council's immediate obligation to resettle a citizen living in the sanitary security zone of a railway.<sup>205</sup> She also recalled that, in the case of another Cherepovets resident, a domestic court had expressed doubts as to whether the applicant's placement on that waiting list could be regarded as giving a real chance to live in an environment favorable to life and health.<sup>206</sup>

In their initial observations, the Government accepted that the applicant lived in the sanitary security zone, but argued that her placement on a waiting list was necessary to protect the rights of other subjects in the same situation. In their post-admissibility observations, however, the Government disputed the very fact that the applicant's home was situated within the plant's sanitary security zone.<sup>207</sup> They further maintained that, in any case, Russian legislation allowed people to reside temporarily in environmentally unfavorable territories. The Government also pointed out that

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<sup>199</sup> Cf. Ledyayeva v Russia, Application No. 53157/99, currently pending; Dobrokhoytova v Russia, Application No. 53247/99, currently pending; Zolorateva v Russia, Application No. 53695/00, currently pending; Romashina v Russia, Application No. 56850/00, currently pending.

<sup>200</sup> Fadeyeva v Russia, at 64 and 71.

<sup>201</sup> Fadeyeva v Russia, at 73.

<sup>202</sup> These included: formaldehyde, benzopyrene and dust containing silicon dioxide, ferroalloy dust, nitrogen dioxide, naphthalene and hydrogen sulphide, cf. Fadeyeva v Russia, at 40.

<sup>203</sup> Fadeyeva v Russia, at 46.

<sup>204</sup> Fadeyeva v Russia, at 47.

<sup>205</sup> Ivaschenko v the Krasnoyarsk Railways, cf. Fadeyeva v Russia, at 57.

<sup>206</sup> Fadeyeva v Russia, at 58.

<sup>207</sup> Fadeyeva v Russia, at 111.

domestic authorities constantly monitored the plant's emissions and had imposed administrative sanctions on several occasions.<sup>208</sup> Lastly, the Government submitted that the applicant had come to nuisance by moving into an area where the plant had already been in operation for many years.<sup>209</sup>

Contrary to the Court's requests, the Government did not produce the information on the emission levels recorded at the monitoring station next to the applicant's block. They instead produced a 2004 Report, based on long-term average of pollutant levels. This data showed that the local environmental situation had improved in recent years, although admittedly five priority pollutants still exceeded safety standards and more than 150.000 people lived in a zone where the level of acceptable risk was exceeded.<sup>210</sup> However, the Government stressed that pollution in the applicant's area was not significantly different from that in other areas of the city.

Overall, the Government accepted that pollutants in the applicant's area exceeded the limits set by domestic law. Nevertheless, they submitted that there was no evidence that the applicant's private life had in any way been disrupted by this, as the damage she suffered was merely potential.<sup>211</sup> The Government denied that the applicant had established a link between her health problems and her place of residence, as the diseases she was suffering from had merely occupational nature.<sup>212</sup> The Government further submitted that this specific issue had never been considered by a domestic court and therefore the applicant had failed to exhaust the domestic remedies available to her.<sup>213</sup>

The Court preliminarily observed that both parties had accepted that the applicant's place of residence was affected by industrial pollution and that this was caused by the steel plant. The dispute therefore pertained to whether the nuisance suffered by the applicant amounted to interference relevant to her rights under Article 8.<sup>214</sup>

The Court recalled that the Convention did not include a right to nature preservation and that, in order to raise an issue under Article 8, there had to be some interference, which *directly* affected the applicant's home, family or private life.<sup>215</sup> Accordingly, the Court asserted that, in order to fall under this provision, claims relating to *environmental nuisance* had to show *actual* interference with the applicant's private sphere and that a *certain minimum level* of severity was attained.<sup>216</sup> The Court specified that the relevant criteria in this respect included *the intensity and duration of the nuisance, its physical or mental effect and the general environmental context*.<sup>217</sup> The Court also clarified that there could be no arguable claim if the detriment complained of was *negligible* in comparison to environmental hazards *inherent to life in every modern city*.<sup>218</sup>

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<sup>208</sup> Fadeyeva v Russia, at 114.

<sup>209</sup> Fadeyeva v Russia, at 112.

<sup>210</sup> Fadeyeva v Russia, at 37.

<sup>211</sup> Fadeyeva v Russia, at 74.

<sup>212</sup> Fadeyeva v Russia, at 77.

<sup>213</sup> Fadeyeva v Russia, at 75.

<sup>214</sup> Fadeyeva v Russia, at 67.

<sup>215</sup> Fadeyeva v Russia, at 68. Cf. also Kyrtatos v Greece, at 52.

<sup>216</sup> Fadeyeva v Russia, at 70.

<sup>217</sup> Fadeyeva v Russia, at 69.

<sup>218</sup> Ibidem.

On the facts of the case, the Court acknowledged that Mrs. Fadeyeva had failed to prove a causal link between the pollution produced by the plant and her health conditions.<sup>219</sup> Nevertheless, it observed that the plant had systematically breached the safety standards prescribed by domestic law, leading to an increase in local morbidity rate. Over the years the breach of domestic standards had remained unaltered and the Court agreed with the applicant that the Government's failure to produce the information requested could hide more severe short term violations of safety regulations. As the area where Mrs. Fadeyeva lived was classified as unfit for habitation and her right to be resettled had been acknowledged by national courts,<sup>220</sup> the Court found it established that the interference with the applicant's private sphere had been *taken for granted* at the domestic level.<sup>221</sup>

On these grounds, the Court found that, although the applicant had been unable to prove a specific harm to her health, '*the very strong combination of indirect evidence and presumptions*' made it possible to conclude that her health had deteriorated as a result of the prolonged exposure to industrial emissions. The Court further asserted that, even assuming that the pollution had not caused any quantifiable harm to the applicant's health, it had inevitably made her *more vulnerable* to various diseases, affecting the quality of life at her home.<sup>222</sup> The Court accordingly accepted that the actual detriment to Mrs. Fadeyeva's health and well-being had reached a level sufficient to constitute interference within the notion of Article 8 of the Convention.<sup>223</sup>

The Court went on to consider whether this interference could be attributed to the Russian authorities. The Court noted that, although the plant was privately owned, this did not relieve domestic authorities of their responsibilities, as '*failure to regulate private industry*' might entail a violation of their positive obligations.<sup>224</sup> The Court observed that domestic authorities had *de facto* controlled the plant through the imposition of operational conditions and supervision of their implementation.<sup>225</sup> Equally, the competent authorities were aware of the situation of persistent illegality affecting the plant, which had lasted for several decades. Consequently, in the Court's opinion there was '*a sufficient nexus*' between the emissions and State authorities, which had been in a position to evaluate the hazards related to the plant's operation and to reduce them.<sup>226</sup>

The Court went on to establish whether the domestic authorities' conduct could be regarded as justified according to the principles listed in the second paragraph of Article 8. The Court recalled that *direct interferences* with this provision were acceptable only when they took place *in accordance with the law*.<sup>227</sup> The Court went on to explain that, in relation to positive obligations, this criterion merely represented *one of many aspects* that should be taken into account when assessing whether the

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<sup>219</sup> Fadeyeva v Russia, at 80.

<sup>220</sup> Fadeyeva v Russia, at 86.

<sup>221</sup> Fadeyeva v Russia, at 86.

<sup>222</sup> Fadeyeva v Russia, at 88.

<sup>223</sup> Ibidem.

<sup>224</sup> Fadeyeva v Russia, at 89. Cf. *mutatis mutandis*, Hatton and others v UK, GC, at 98: 'Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly'.

<sup>225</sup> Fadeyeva v Russia, at 90.

<sup>226</sup> Fadeyeva v Russia, at 92.

<sup>227</sup> Fadeyeva v Russia, at 95.

State had struck a fair balance between the competing interests and not as a separate and conclusive test.<sup>228</sup>

The Court accepted that the economic well-being of the country constituted a legitimate aim according to the second paragraph of Article 8<sup>229</sup> and went on to consider whether domestic authorities had struck a fair balance between the interests at stake on the facts of the case.

The Court preliminarily asserted that, as well-established in its jurisprudence, environmental pollution had become *a matter of growing public concern in today's society*.<sup>230</sup> Although it was not appropriate to adopt *a special approach* by reference to *a special status of environmental human rights*,<sup>231</sup> still the Court found that it lay within its competence to evaluate whether there had been a *manifest error of appreciation* on the part of the national authorities.<sup>232</sup> In this connection, the Court Stated that it had a merely subsidiary role with reference to the *complexity of issues* involved with environmental protection,<sup>233</sup> and that only in exceptional circumstances could it go beyond the mere assessment on the fairness of the decision, revising the domestic authorities' conclusions.<sup>234</sup>

The Court noticed that the plant operated in persistent conditions of non-compliance with domestic legislation<sup>235</sup> and the introduction of a sanitary security zone was meant to limit its impact on the local population's health. In the Court's opinion, the existence of this zone was a *condicio sine qua non* for the operation of a *dangerous enterprise*, which, *otherwise*, should have been *closed or significantly restructured*.<sup>236</sup> On the facts of the case, the Court noted that the sanitary security zone had not served its purpose, as pollution levels in the city had continued to exceed safety levels.<sup>237</sup>

The Court established that Mrs. Fadeyeva undisputedly lived within the sanitary security zone.<sup>238</sup> The fact that her place of residence was not significantly more polluted than other areas of the city did not change the circumstance that she lived in a special area where industrial pollution exceeded safety levels and *any housing was in principle prohibited by domestic legislation*.<sup>239</sup> The Court did not find that fact that the applicant had come to the source of nuisance *proprio motu* made any substantial difference to her claim. In its opinion, Mrs. Fadeyeva had not contributed to the creation of the risk to which she was subject, as she had not been in a position to evaluate the health hazards of her accommodation, whereas State authorities were well aware of them.<sup>240</sup> Furthermore, although in theory there were no obstacles to Mrs. Fadeyeva's moving away from the endangered zone, in practice she had no economic means to do so.<sup>241</sup>

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<sup>228</sup> Fadeyeva v Russia, at 98.

<sup>229</sup> Fadeyeva v Russia, at 101.

<sup>230</sup> Fadeyeva v Russia, at 103; cf. also Fredin v Sweden, at 48.

<sup>231</sup> Hatton and others v UK GC, at 122.

<sup>232</sup> Fadeyeva v Russia, at 105.

<sup>233</sup> Ibidem.

<sup>234</sup> Ibidem.

<sup>235</sup> Fadeyeva v Russia, at 116.

<sup>236</sup> Fadeyeva v Russia, at 116.

<sup>237</sup> Fadeyeva v Russia, at 117.

<sup>238</sup> Fadeyeva v Russia, at 118.

<sup>239</sup> Fadeyeva v Russia, at 119.

<sup>240</sup> Fadeyeva v Russia, at 120.

<sup>241</sup> Fadeyeva v Russia, at 121.

As Russian law did not clarify the action to be taken with regard to persons who already lived in sanitary security zones, the Court did not consider that the domestic courts' decisions had been unreasonable.<sup>242</sup> However, the measures they applied had made no difference to Mrs. Fadeyeva, who had little hope to be resettled in the near future.<sup>243</sup> The Court nevertheless noted that '*the State had at its disposal a number of other tools capable of preventing or minimising pollution*'.<sup>244</sup>

In this respect, the Court established that, even if the pollution in Cherepovets had decreased in the last 20 years, still the standards set by domestic legislation had continued to be systematically breached.<sup>245</sup> The Court observed that, although it was not its task of determining the measures that should have been taken in order to reduce pollution more efficiently,<sup>246</sup> it was certainly within its jurisdiction to assess whether the Government had approached the problem with due diligence. In particular, the Court asserted that it was incumbent upon the State to justify a situation in which certain individuals bore *a heavy burden* on behalf of the rest of the community.<sup>247</sup>

The Court pointed out that the Government had not produced any copies of the plant's operating permit, nor it had specified how the local population's interests had been taken into consideration.<sup>248</sup> Similarly, the Court highlighted that it had not received any proof of the checks and penalties allegedly inflicted upon the plant.<sup>249</sup> As the poor information submitted by the Government made it difficult to appraise their overall policies, the Court found by *adverse inference* that they had not attached *due weight* to the interests of the community living near the plant.<sup>250</sup>

The Court further emphasised that domestic authorities had not offered any effective solution to the applicant's petition for resettlement. This had happened in the context of a situation of widespread breach of domestic environmental standards, which the authorities had not attempted to remedy. In the light of the above, the Court concluded that the Russian authorities had failed to strike a fair balance between the interest of the community and Mrs. Fadeyeva's effective enjoyment of her right to respect for her home and private life.

The applicant was granted 6,000 EUR for the non-pecuniary damage associated with the distress caused by her prolonged exposure to industrial pollution. The Court did not grant any pecuniary damage, as the applicant had not incurred any expenses or material loss related to the breach of her rights. Furthermore, the Court made express reference to the fact that the Government had to take *appropriate measures* to remedy the applicant's individual situation.<sup>251</sup> The Russian Government asked that the case be referred to a Grand Chamber, but the request was rejected.

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<sup>242</sup> Fadeyeva v Russia, at 122.

<sup>243</sup> Fadeyeva v Russia, at 122.

<sup>244</sup> Fadeyeva v Russia, at 124.

<sup>245</sup> Fadeyeva v Russia, at 126.

<sup>246</sup> Fadeyeva v Russia, at 128.

<sup>247</sup> Ibidem.

<sup>248</sup> Fadeyeva v Russia, at 129.

<sup>249</sup> Fadeyeva v Russia, at 130.

<sup>250</sup> Fadeyeva v Russia, at 131.

<sup>251</sup> Fadeyeva v Russia, at 142.

The reasoning employed by the Court raises a number of crucial points. First of all, the decision marks a further opening in the interpretation of the victim requirement under the Convention. Although the applicant had not proved any specific health condition or property damage, the fact that she lived in an area affected by unlawful pollution induced the Court to conclude that there had been an interference with her rights.<sup>252</sup> With close analogy to the case of *Taskin and others v Turkey*, Mrs. Fadeyeva's exposure to a risk was considered sufficient to constitute an actual violation of her rights.<sup>253</sup> More than in *Taskin*, though, not only the applicant had not been able to prove any damage to her health, but she did not have any title to property and had moved to an area severely affected by pollution on her own initiative.<sup>254</sup> Furthermore, her conditions were the same as those of the other 150, 000 local residents.

The circumstances could not be more different from those of the case of *Tauria* (cf. *above*), where the applicants' health had been severely affected by radioactivity. In the *Fadeyeva* case, however, rather than imposing on the applicant the to demonstrate that she had suffered for health conditions, the Court established that the breach of domestic regulations was enough to establish interference with her rights. In this respect, the Court was ready to find that, given the violation of national law engineered to protect local residents from the health hazards posed by the operation of the iron smelter, there had been *ipso iure* an undue interference with the applicant's rights. This represents a clear departure from the previous jurisprudence of the Court, which required *reasonable and convincing evidence* of the *probability of the occurrence of a violation* concerning the applicants *personally*, as *mere suspicions or conjectures* were *not enough*.<sup>255</sup> In *Fadeyeva*, instead, the Court placed upon the State the burden to produce *detailed and rigorous data* justifying the policies adopted with regard to environmental pollution.<sup>256</sup> As the poor information submitted by the defending State made it difficult to evaluate its overall policies, the Court found by *adverse inference* that it had not attached *due weight* to the interests of the local community.<sup>257</sup> This finding is quite remarkable. The Court has instituted the practice of finding by adverse inference in cases of lack of cooperation by domestic authorities,<sup>258</sup> but it has never done so in connection with an *environmental claim*.

Thus in the *Fadeyeva* decision the Court seems to have offered a pragmatic answer to the question of evidence, one of the most problematic aspects of environmental cases. The applicant did not need to prove damage to her health and her victim status was grounded on *indirect evidence and presumptions*, seemingly resulting from the very breach of domestic standards.<sup>259</sup> This finding seems all the more remarkable when one considers that there are 150, 000 persons enduring the same identical conditions of

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<sup>252</sup> *Fadeyeva v Russia*, at 88.

<sup>253</sup> *Fadeyeva v Russia*, at 87. cf. also *Taskin v Turkey*, at 110.

<sup>254</sup> *Fadeyeva v Russia*, at 139.

<sup>255</sup> *Asselbourg and others v Luxembourg*, Application No. 29121/95, at 1.

<sup>256</sup> *Fadeyeva v Russia*, at 128.

<sup>257</sup> *Fadeyeva v Russia*, at 131.

<sup>258</sup> Cf. *Timurta v Turkey*, Application No. 23531/94, at 66, where the Court maintained that 'where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 at 1 (a) of the Convention, but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.

<sup>259</sup> *Fadeyeva v Russia*, at 80.



Mrs. Fadeyeva. Four of them have already applied to the Court, their cases have been declared admissible and are currently awaiting for decision.<sup>260</sup> Thousands of others may follow, in case of positive outcome.

In the Fadeyeva case, not only the Court awarded compensation, but also it also specifically asked domestic authorities to take *appropriate measures* to remedy the applicant's situation.<sup>261</sup> In this respect, the Court found that, although the domestic courts had acted properly, even when enforced, their pronouncements were unsuitable to offer redress to the applicant. The Court further observed that due to the lack of effective remedy for the violation of domestic standards, Mrs Fadeyeva would have continued being a victim for the foreseeable future. In this State of affairs, the Court concluded that domestic authorities had to take action otherwise in order to solve the situation. Although the Court had previously taken the initiative of requesting specific action with regard to Article 8 claims,<sup>262</sup> This represented a novelty for an *environmental* case and previous attempts to challenge the national legislation's adequacy to the protection of rights under Article 8 had met the Court's self-restraint.<sup>263</sup> This further leaves room to speculate that in future the Court may institute the practice of demanding specific remedial action in cases of severe environmental degradation.

In the instant case the Court was also particularly generous in enunciating the criteria that it employs in establishing whether environmental pollution raises any issue under Article 8. The elements quoted in this respect were the *intensity and duration of the nuisance*, its *physical and mental effects* and the *general environmental context*.<sup>264</sup> The Court also took the occasion to elaborate on the weight to be attached to the lawfulness of the public authorities' actions, surpassing the principle expressed in the Hatton decision by establishing that this question had to be considered '*as one factor to be weighed among others and not as a separate and conclusive test*'.<sup>265</sup> The Court further emphasised that the Convention might only be engaged by cases of environmental deterioration which are not '*negligible in comparison to the environmental hazards inherent to life in every modern city*'.<sup>266</sup>

The Fadeyeva judgment represented a landmark evolution in the Court's jurisprudence.<sup>267</sup> The line established in this decision found remarkable confirmation in 2006, with the decision in *Öçkan and others v Turkey*.<sup>268</sup> The applicants were 315 residents of the village of Ovacik, as were the applicants in *Taskin and others v Turkey*. The application was based on analogous grounds and had been filed on the same day, by the same legal advisor. The applicants complained that the operation of a goldmine had breached their rights under Article 8 and that the public authorities' inertia had breached their rights under Article 6.

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<sup>260</sup> Cf. Ledyayeva v Russia, Application No. 53157/99, currently pending; Dobrokhoytova v Russia, Application No. 53247/99, currently pending; Zolorateva v Russia, Application No. 53695/00, currently pending; Romashina v Russia, Application No. 56850/00, currently pending.

<sup>261</sup> Fadeyeva v Russia, at 105.

<sup>262</sup> Cf. for example Görgülü v Germany, Application No. 74969/01, at 64.

<sup>263</sup> Cf. Asselbourg and others v Luxembourg, Application No. 29121/95, at 1.

<sup>264</sup> Fadeyeva v Russia, at 69.

<sup>265</sup> Fadeyeva v Russia, at 98.

<sup>266</sup> Fadeyeva v Russia, at 68.

<sup>267</sup> For an early comment, cf. P. LEACH, Stay inside when the wind blows your way - engaging environmental rights with human rights, 4 Environmental Liability 91 (2005), p. 91.

<sup>268</sup> Öçkan and others v Turkey, Application No. 46771/99.

The Court acknowledged that the subject-matter of the application had already been considered in the Taskin case. The claim was granted both on Article 8 and 6 grounds and the brief decision reproduces *verbatim* whole paragraphs of the Taskin judgment. Accordingly, the mere threat of damage to the applicants' health and property was sufficient to constitute a violation of their rights. As in Taskin, the applicants received 3,000 EUR each in compensation, but the reasoning of the Court in the two instances presented some marked differences. In the Taskin decision, the Court had Stated that the violation of the Convention had '*undoubtedly caused the applicants a considerable degree of damage*', as they were '*obliged to tolerate adverse living conditions and to bring several actions against decisions taken by the central authorities*'.<sup>269</sup> In the Öçkan case, by contrast, the Court observed that it did not see a causal link between the noted violations and an unspecified material damage or a physical injury.<sup>270</sup> Therefore, it did not provide any compensation for pecuniary damage, but allocated with each applicant 3,000 EUR in equity for *moral damage*.<sup>271</sup>

Therefore, meanwhile in Taskin the Court had made reference to a generic *considerable degree of damage*, without further specification, in Öçkan the Court explicitly Stated that there had been no physical or material injury, but still compensated the applicants for the moral pledge associated with the distress they suffered. Consequently, the Court expressly acknowledged what seemed to be implicit in its recent case law, *i.e.* that the distress associated with the lack of enforcement of domestic regulations in environmental matters may pave the way to compensation in Strasbourg.

The judgment reinforced the broad interpretation of the notion of victim adopted in the Court's recent case law. The Öçkan case was the first to deal with a *replica* environmental claim and may be regarded as the first sample of mass applications hypothesised with reference to the Fadeyeva judgment. The impact of this case law on the enforcement of domestic regulations may be quite significant and domestic authorities may start feeling an increased incentive in adopting a preventive approach. The Öçkan decision is going to cost the Turkish government 945,000 EUR and the authorities managed to persuade a number of applicants to settle the claim out of court. This last resort approach may soon be followed by better enforcement of domestic regulations, in line with the spirit of the Convention.

### ***Some conclusions***

The review of the Court's *environmental cases* under Article 8 permits to draw some general conclusions on the way in which this provision has been interpreted for the pursuit of environmental interests. The Court has increasingly found that respect for private and family life includes the protection against a number of environmentally sensitive intrusions.

In its initial decisions, the Court acknowledged that positive obligations incumbent upon national authorities required appropriate environmental standards in domestic law and their effective implementation (cf. *López-Ostra v Spain*). In the majority of

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<sup>269</sup> Taskin and others v Turkey, at 140.

<sup>270</sup> Öçkan and others v Turkey, at 61.

<sup>271</sup> Ibidem, at 62.

cases, environmental domestic standards were not implemented and their adequacy was not scrutinised on the merits.

The decisions in the cases of Taskin and Fadeyeva brought further evolutions. The Court identified with greater precision the factors relevant to the application of Article 8<sup>272</sup> and has proved more willing to require States to justify their environmental policies.<sup>273</sup> Moreover, in the Fadeyeva decision the Court has taken the initiative of finding by adverse inference and has fallen short of asking for positive action to remedy the applicant's situation.

The most salient feature of the recent case law, however, is the consistent broadening of the victim requirement. In environmental cases the crucial question is to establish when an individual may claim to be a victim under the Convention. The case law under Article 8 shows that the Court has accepted that the applicants' *vulnerability* to future harm is enough to bring them within the relevant notion of victim. In this regard, the breach of domestic standards has been considered sufficient to constitute a violation of the applicants' rights, without requiring any material prejudice to their personal sphere. The mere threat of damage has therefore become relevant also in environmental cases, clearly breaking new ground in the jurisprudence of the Court.

In this respect, the Court seems to have established a twofold approach. In cases where the applicants were unable to obtain any recognition of their rights at the domestic level, the Court seems to demand that they prove that a certain prejudice affected their personal sphere – e.g. *López-Ostra v Spain* and, more recently, *Moreno Gomez v Spain*. Where applicants obtained acknowledgement of their rights by domestic courts, the Court adopted a more liberal approach to the victim requirement and was satisfied by far lighter forms of interference with the applicants' rights – cf. the cases of Taskin, Fadeyeva and Öçkan. Hence a very interesting opening, allowing applicants to challenge the lack of enforcement of domestic regulations in Strasbourg.

Nevertheless, at present only egregious failures are likely to give rise to responsibility, on a marginal view of the role of the Court. This factor may be further appreciated with regard to the case law of the Court in other environmental cases, relying upon other provisions of the Convention.

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<sup>272</sup> According to a listing compiled by Philip Leach, possible factors include: the extent direct effect on a person's right to respect for their private and family life and/or their home; the extent of the actual interference with the applicant's private sphere; the effects on a person's well-being, such as the adverse effect on the quality of a person's private life, on the scope of enjoying the amenities of a person's home; whether a minimum threshold as to the adverse effects has been reached, depending on the intensity, duration and physical and mental effects; the probability of the occurrence of the damage; an increase in vulnerability to disease. Cf. P. LEACH, *Stay inside when the wind blows your way*, cit., p. 91.

<sup>273</sup> *Fadeyeva v Russia*, at 105; *Taskin and others v Turkey*, at 117.

### 3. The new frontier of Article 2

According to Article 2 of the Convention,

1. *Everyone's right to life will be protected by law. No one will be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life will not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
  - a. *in defence of any person from unlawful violence*
  - b. *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - c. *in action lawfully taken for purpose of quelling a riot or insurrection.*

The right to life is the most fundamental of human rights and represents '*one of the most basic values of the democratic societies making up the Council of Europe.*'<sup>274</sup> The right primarily refers to the prohibition of the arbitrary or negligent taking of human life by or on the behalf of the State. The norm does not allow any derogation in time of war or public emergency<sup>275</sup> and the only exceptions concern capital punishment and deaths resulting from the use of force for purposes permitted by the second paragraph of Article 2.<sup>276</sup>

The '*serious and irreparable nature*' of violations of this right has suggested a broad interpretation of its protection.<sup>277</sup> According to the Court's consolidated case law, Article 2 '*does not solely concern deaths resulting directly from the actions of agents of the State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.*'<sup>278</sup> In general, the extent of the obligations depends on factors such as the harmfulness of dangerous activities and the foreseeability of risks to life.<sup>279</sup>

Public authorities' obligations in relation to the right to life are not just preventive: the Court has also developed a procedural aspect of Article 2, including guarantees relating to the due investigation of cases of loss of life and the prosecution of those responsible for it.<sup>280</sup>

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<sup>274</sup> Cf. *McCann v UK*, Application No. 18984/91, at 147.

<sup>275</sup> Cf. Article 15 of the Convention.

<sup>276</sup> With regard to capital punishment, however, the Sixth Protocol to the Convention abolished the death penalty in peacetime for all its parties. Cf. Sixth Protocol to the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg, 28 April 1983, CETS No. 114, entered into force in 1988. To the date, the Protocol has been ratified by all the Member states, except for Russia.

<sup>277</sup> Cf. *Soering v UK*, Application No. 14038/88, at 90.

<sup>278</sup> *LCB v UK*, Application No. 23413/94, at 36; *Paul and Audrey Edwards v. UK*, Application No. 46477/99, at 54; *Öneryıldız v. Turkey*, Application No. 48939/99, GC, at 71.

<sup>279</sup> *Öneryıldız v. Turkey*, GC, cit., at 73; *LCB. v. UK*, cit., at 37-41.

<sup>280</sup> Cf. *McCann v UK*, cit., at 161: 'The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.'

The quality of the environment is susceptible of having substantial influence upon the full enjoyment of the right to life and it is not difficult to conceive that the positive obligations related to this provision may apply to some cases of environmental degradation produced directly by State activities, or through the exercise of dangerous activities by third parties.<sup>281</sup> Although other international human rights bodies have taken significant steps in this direction,<sup>282</sup> the European Court of Human Rights has long been reluctant to do so.

In *LCB v UK*,<sup>283</sup> for example, the applicant claimed that the State's failure to warn her parents of the possible risks to her health caused by her father's participation in the nuclear tests, had given rise to a violation of Article 2 of the Convention.<sup>284</sup> The Court acknowledged that if, on the basis of the information available to the State at the time in question, it had appeared likely that exposure of the applicant's father to radiation might have caused a real risk to her health, then the United Kingdom would have been required to act on its own motion to advise her parents and monitor her health.<sup>285</sup> The Court, however was not satisfied that the applicant had proved a causal link between the exposure of her father to radiation and her illness.<sup>286</sup> The Court therefore concluded that, given the information available to the State at the relevant time, it could not have been expected to act of its own motion to notify the applicant's parents of the risks or to take any other special action in relation to her. Accordingly, no violation of Article 2 had taken place.

This decision placed a heavy burden of proof upon the applicant, requiring her to prove a direct and unequivocal link between her health conditions and the irradiation to which her father had been subjected. This attitude was in line with the Court's established approach to *environmental cases* at that time, as confirmed by decisions such as *Tauria and others v France*.<sup>287</sup> In 2002, however, this trend saw a substantial development with the case of *Öneryıldız v. Turkey*.

### ***Öneryıldız v. Turkey***<sup>288</sup>

*Öneryıldız v. Turkey* was the first case in which the Court declared a violation of Article 2 in connection with lack of enforcement of environmental regulations. The applicant complained that the Turkish authorities had violated the right to life and peaceful enjoyment of possessions in failing to prevent a gas explosion at a waste storage site, which had caused the death of 9 members of his family and the destruction of his home. He further maintained that he had not been granted a fair and prompt remedy, contrary to Articles 6 and 13 of the Convention.

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<sup>281</sup> R.S. PATHAK, *The Human Rights System as a Conceptual Framework for Environmental Law*, in: *Environmental Change and International Law*, WEISS ed., Tokyo, 1992, p. 205.

<sup>282</sup> For the UNHRC, cf. the case of *Port Hope Environmental Group v Canada*, No. 67/1980, *Selected Decisions of the UN Human Rights Committee*, 1990, p. 20; for the Inter-American Commission, cf. the case of *Yanomani Indians v Brazil*, Decision 7615, IACHR, *Inter-American YB on Human Rights* (1985), p. 264; *Community of San Mateo de Huanchor and its Members v Perú*, Case 504/03, Report No. 69/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 487 (2004).

<sup>283</sup> *LCB v UK*, Application No. 23413/94.

<sup>284</sup> *LCB v UK*, at 24.

<sup>285</sup> *LCB v UK*, at 38.

<sup>286</sup> *LCB v UK*, at 39.

<sup>287</sup> *Tauria and others v France*, cf. Chapter 2.

<sup>288</sup> *Öneryıldız v. Turkey*, Application No. 48939/99.

The waste storage site had operated under the authority of the city council and the ministerial authorities, to the service of a number of districts of the city of Istanbul. Originally the site was 3.5 kilometres from the nearest built-up area, but over the years a number of illegal dwellings had developed in its proximity, including that where the applicant's family had been living since 1988.

In 1991 an expert report warned the authorities that the waste storage site posed several risks to the lives of local residents, with multiple breaches of safety standards prescribed by national law. The report instigated a lengthy dispute between national authorities, but no action was taken in order to prevent the risks denounced. As the dispute continued, in 1993 a methane explosion caused a landslide that engulfed slum dwellings, causing the death of 39 people, including the applicant's wife, his concubine and 7 of his children.

Investigations started immediately and, according to an expert report, 2/3 liability for the accident was attributed to public authorities. The Turkish Administrative Council brought criminal proceedings against two local mayors for negligence in the performance of their duties. No proceedings were ever brought against any other public authority involved, nor charges of manslaughter made. In 1996 the mayors were sentenced to the minimal term of imprisonment and to fines of 160.000 TRL. However, the sentence was suspended, as the court was satisfied that the defendants would not offend again.

A few weeks after the incident, Mr. Oneryildiz lodged a complaint against the authorities whose negligence had caused the engulfing of his home and the death of his relatives. The complaint was added to the public prosecutor's file. The applicant, however, maintained that he had never been informed of the criminal proceedings against the two mayors.

In September 1993 Mr. Oneryildiz also sought compensation from the administrative authorities for the harm he had suffered as a result of the accident. The domestic court acknowledged the causal link between the accident and the contributory negligence of the authorities in question, granting to the applicant 100.000.000 TRL for non-pecuniary damage and 10.000.000 for pecuniary damage (equivalent to 2.077 EUR and 208 EUR, respectively). The limited amount of compensation was justified on grounds that the applicant had not had a legitimate title to the property and that after the accident he had received subsidised accommodation from the council. The sentence was served in 1998, but to the date of proceedings in Strasbourg the sum had not yet been paid.

The applicant made recourse to the European Court of Human Rights, arguing that the death of his family members and flaws in the relevant proceedings had constituted a violation of his rights. The Turkish Government opposed the claim, submitting that the concept of a positive obligation under Article 2 could not be construed as imposing a duty to protect life in circumstances giving rise to '*allegations of negligence*'.<sup>289</sup> They further argued that the operation of an installation for the storage of waste involved only a *very slight risk* and should not be regarded as the exercise of

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<sup>289</sup> Oneryildiz v. Turkey, at 59.

a potentially dangerous activity comparable with those pertaining to nuclear or industrial installations.<sup>290</sup>

By reference to its established case law,<sup>291</sup> the Court recalled that, although not every presumed threat to life obliges the authorities to take concrete measures to avoid that risk, *'the position is different if it is established that the authorities knew, or ought to have known at the time, of the existence of a real and immediate risk to the life of an individual (...) and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk'*.<sup>292</sup>

The Court further emphasised that recent development of European standards confirmed *'an increased awareness of the duties incumbent on the national public authorities in the environmental field, particularly with regard to installations for the storage of household waste and the risks inherent in operating them'*.<sup>293</sup>

In the Court's view, the positive obligations to take appropriate steps to safeguard the lives of those within their jurisdiction for purposes of Article 2 were applicable to the case in question and it proceeded to assess compliance under two heads: implementation of preventive regulations and respect for the public's right to information.

As to the first, the Government submitted that the Turkish authorities had always gone to great lengths to protect the life of slums' inhabitants, attempting to fight against their expansion. Furthermore, the Government pointed out that local residents had resisted the waste-collection site redevelopment.<sup>294</sup>

The applicant, on the other hand, maintained that one third of the Turkish population lived in slums, which were *encouraged* by the frequent amnesty laws passed to regularise them. As to his personal situation, the applicant argued that local authorities were well aware of the existence of the slum where he lived and even provided it with essential installations and services, charging council taxes.<sup>295</sup>

The Court observed that the issue of waste storage was the object of extensive legislation at national level, which was admittedly breached in the case of the site in question.<sup>296</sup> In this regard, the Court asserted that *'it was impossible for the administrative and municipal departments (...) not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations in the area which, moreover, were not in any way complied with.'*<sup>297</sup>

The cessation of the redevelopment of the site could not be imputed to residents, but to local authorities, which had remained inactive in the face of the risks posed by the waste storage site. Furthermore, even if national authorities had never encouraged the

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<sup>290</sup> Ibidem.

<sup>291</sup> Osman v UK, Application No. 23452/94, at 115-116.

<sup>292</sup> Öneriyildiz v. Turkey, at 63.

<sup>293</sup> Öneriyildiz v. Turkey, at 64.

<sup>294</sup> Öneriyildiz v. Turkey, at 69.

<sup>295</sup> Öneriyildiz v. Turkey, at 72.

<sup>296</sup> Öneriyildiz v. Turkey, at 74.

<sup>297</sup> Öneriyildiz v. Turkey, at 79.

applicant to set up home in the vicinity of a waste tip, they had not attempted to discourage him from doing so.<sup>298</sup> Consequently, the Court found that there had been a causal link between the national authorities' negligence and the accident causing the death of the applicant's relatives.

The Court then proceeded to assess whether the authorities had fulfilled their duty to inform the public of the dangers to which they were exposed. The Court noted that the present case featured marked similarities to the circumstances of the case of *Guerra and others v Italy*,<sup>299</sup> asserting that the authorities' *duty to impart information about the dangers of which only they had knowledge* under Article 8 extended *a fortiori* to the positive obligations under Article 2.<sup>300</sup> The Court considered that ordinary citizens such as the applicant could not be expected to know of the specific risks inherent in the process of methanogenesis and of a possible landslide at the site. The Court further noticed that, even if the applicant had been personally aware of the risks affecting his family, this would not have absolved the authorities from the responsibility of having permitted the situation thereof.<sup>301</sup> Accordingly, the Court concluded that domestic authorities had breached their duty to do everything that could reasonably be expected of them to protect the applicant's family, *unless* the applicant's complaints had been properly dealt with at domestic level.<sup>302</sup>

The Court emphasised that, in addition to the payment of compensation, the procedural guarantees under Article 2 required '*a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death*' and the '*putting in place of effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions*'.<sup>303</sup> The Court also recalled that, if infringement of the right to life were not caused intentionally, Article 2 did not necessarily require the provision of a criminal-law remedy.<sup>304</sup>

With regard to the specific circumstances of the case, the Court noted that, although administrative and criminal proceedings had been brought against the local authorities, they were affected by a series of substantial flaws. First of all, the applicant had not been given the opportunity to access criminal proceedings. The Court further noted that the domestic courts had failed to consider the life-endangering aspects related to the negligent conduct of the local authorities, giving derisory sanctions amounting to *virtual impunity* for the defendants.<sup>305</sup>

As to the administrative proceedings, the Court noted that the remedy awarded to the applicant was too little and too late. The sentence was served over 4 years after the applicant's complaint and, furthermore, the symbolic compensation he had been

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<sup>298</sup> *Öneryildiz v. Turkey*, at 81.

<sup>299</sup> *Guerra and others v Italy*, cf, Chapter 2.

<sup>300</sup> *Öneryildiz v. Turkey*, at 84.

<sup>301</sup> *Öneryildiz v. Turkey*, at 86.

<sup>302</sup> *Öneryildiz v. Turkey*, at 88.

<sup>303</sup> *Öneryildiz v. Turkey*, at 91.

<sup>304</sup> *Öneryildiz v. Turkey*, at 92.

<sup>305</sup> *Öneryildiz v. Turkey*, at 109.



awarded had never been paid.<sup>306</sup> Accordingly, the Court concluded that there had been a violation of Article 2.<sup>307</sup>

The Court did not find it necessary to consider the applicant's claims under Article 6, 8 and 13, as they had been absorbed by the finding of a breach of Article 2. Instead the Court found that the case deserved further analysis on grounds of Article 1 of Protocol No. 1 to the Convention.

The applicant had submitted that Turkish law recognised the right of acquisition of property by adverse possession and maintained that he had used his house continuously for a sufficiently long time to be regarded as its owner. He further maintained that the explosion at the waste storage site had impaired his property right which had not been redressed by the accommodation he later purchased from the council at a favorable rate. As to the compensation he had received through the administrative proceedings, the applicant criticised the contemptuous reasoning of the domestic courts, which found that the family was not supposed to own household electrical appliances and therefore refused to compensate him for it. In any case, the applicant pointed out that compensation had still not been paid and the amount liquidated had become insignificant, due to high monetary depreciation observed in Turkey.<sup>308</sup>

The Government disputed the applicant's claims, asserting that the unlawfulness of his dwellings prevented him from bringing any claims under Article 1 of Protocol No. 1 to the Convention.<sup>309</sup>

The Court recalled the autonomy of the concept of possession under the Convention, emphasising that *'neither the lack of recognition by the domestic laws of a private interest such as a 'right' nor the fact that these laws do not regard such interest as a 'right of property', prevented the interest in question from being regarded as a 'possession' within the meaning of Article 1 of Protocol No. 1.'*<sup>310</sup> The Court proceeded to assess whether the applicant could be considered to be entitled to a substantial proprietary interest relevant to the purposes of the norm.

The Court acknowledged that the applicant had never attempted to obtain the regularisation of his dwellings, which were undoubtedly unlawful. The Court, however, found that *'the applicant was nonetheless to all intents and purposes the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it.'*<sup>311</sup> The Court noticed that since 1988 Mr. Öneriyildiz had been living in that dwelling without being bothered by the authorities, without paying any rent and establishing a social and family environment, as *'there had been nothing to stop him from expecting the situation to remain the same for himself and his family.'*<sup>312</sup>

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<sup>306</sup> Öneriyildiz v. Turkey, at 118.

<sup>307</sup> Öneriyildiz v. Turkey, at 122.

<sup>308</sup> Öneriyildiz v. Turkey, at 133.

<sup>309</sup> Öneriyildiz v. Turkey, at 137.

<sup>310</sup> Öneriyildiz v. Turkey, at 139.

<sup>311</sup> Öneriyildiz v. Turkey, at 141.

<sup>312</sup> Ibidem.

The Court asserted that the fact that the applicant had been able to enjoy the illegal dwellings undisturbed amounted to an implicit tolerance by the authorities of his position. Accordingly, it concluded that these dwelling represented a substantial economic interest, which the authorities allowed to subsist over a long period of time, amounting to a ‘possession’ within the meaning of Article 1 of Protocol No. 1 to the Convention.<sup>313</sup>

The Court went on to consider whether there had been interference with the possessions of the applicant. On the facts of the case, the ‘*accumulation of omissions by the administrative authorities regarding the measures necessary to avoid the risk of a methane-gas explosion and an ensuing landslide*’ run counter to the requirement of practical and effective protection of the right guaranteed by Article 1 of Protocol No. 1.<sup>314</sup> Therefore, the interference with the right could not be justified under domestic law. The subsequent administrative proceedings had failed to remedy the situation, as the applicant’s loss was overlooked by the judicial authorities, whose activity had been disproportionately time-consuming and ineffective. Consequently, the Court found that there had been a breach also of Article 1 of Protocol No. 1 to the Convention.<sup>315</sup> The Court awarded compensation to the applicant and his three surviving children, in the amount of EUR 154,000 for pecuniary and non-pecuniary damage.

The decision broke new grounds at several levels. This was the first case in which the Court found a violation of Article 2 in relation to a breach of environmental regulations. Additionally, the Court found that there had been a breach of Article 1 of Protocol No. 1 to the Convention, drastically reviewing its approach to illegitimate dwellings.<sup>316</sup> The Chamber decision, in particular, seemed to suggest that the domestic authorities’ *tolerance* of a situation of widespread illegitimacy could be regarded as sufficient to establish possession within the meaning of the Convention.

Three dissenting judges appended an opinion questioning whether Article 1 was applicable to the facts of the case; meanwhile another two judges contested the application of Article 2. The Turkish Government requested that the case be referred to a Grand Chamber, maintaining that the decision had given place to an ‘*unprecedented extension of the positive obligations inherent in [Article 2],*’ by including in it ‘*all situations of unintentional death.*’<sup>317</sup> The Government warned that such interpretation of the State’s responsibility for facts that were not directly attributable to its agents would broaden excessively the incidence of potential violations of Article 2.<sup>318</sup> The Government further submitted that States were under no obligation to take preventive measures where there was no question of an *immediate danger* within the meaning of the Court’s case law.<sup>319</sup> In particular, the Government submitted that the Chamber had overlooked the precautions and measures put in place by domestic authorities, exercising an excessively close scrutiny of their activities,

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<sup>313</sup> Öneriyildiz v. Turkey, at 142.

<sup>314</sup> Öneriyildiz v. Turkey, at 146.

<sup>315</sup> Öneriyildiz v. Turkey, at 154.

<sup>316</sup> Cf. Chapman v. UK, Application No. 27238/95, at 102, where the Court established that it would be slow ‘to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site’.

<sup>317</sup> Öneriyildiz v. Turkey, GC, at 66.

<sup>318</sup> Öneriyildiz v. Turkey, GC, at 67.

<sup>319</sup> Öneriyildiz v. Turkey, GC, at 77.

contrary to its consolidated jurisprudence under Article 2.<sup>320</sup> The Government further recalled that the victims themselves bore some responsibility for the accident and maintained that the applicant had had access to a satisfactory remedy.

The applicant, on the other hand, confirmed the submissions made before the Chamber, recalling that episodes of negligence on part of the State authorities clearly fell within the meaning of Article 2 of the Convention. The applicant reiterated that the Government had encouraged the slum settlements and had not released fundamental information as to the risks of living near the waste storage site. He furthermore maintained that he had not had access to an effective remedy to complain of the breach of his rights.

The Grand Chamber firstly observed that States' positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction '*must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.*'<sup>321</sup> The Court established that Article 2 was applicable to the facts of the case and went on to consider compliance with this provision.

As to the *substantive* aspect of Article 2, the Grand Chamber recalled that the positive obligation to take all appropriate steps to safeguard life entailed a primary duty on the State to put in place '*a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.*'<sup>322</sup> It further maintained that this obligation indisputably applied to *dangerous activities*, where, '*special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.*'<sup>323</sup>

The Court noted that several factors showed that the authorities were aware of the situation endangering the rights of the victims and, accordingly, they were under a positive obligation to take action to safeguard them. The Grand Chamber considered that *in abstracto* Turkish legislation offered satisfactory safety regulations in the matter of the dispute. The Court, however, agreed with the Chamber that in practice that had not been the case.<sup>324</sup>

The Grand Chamber established that *de facto* the State's policies encouraged the construction of slum dwellings, creating a widespread situation of legal uncertainty as to the enforcement of town planning regulations. In the Court's view, these factors undermined the Government's claiming that the responsibility for the illegal dwellings to be attributed to the victims of the accident. The Court also agreed that access to information represented a fundamental corollary to the obligations of the authorities, which had remained equally unfulfilled.

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<sup>320</sup> Öneriyıldız v. Turkey, GC, at 78. The Government also lamented the fact that the Court was not entitled to 'impose its own point of view as to what might have been the best policy to adopt in tackling the social and economic problems of the Ümraniye slums,' Öneriyıldız v. Turkey, GC, at 80

<sup>321</sup> Öneriyıldız v. Turkey, GC, at 71.

<sup>322</sup> Öneriyıldız v. Turkey, GC, at 89.

<sup>323</sup> Öneriyıldız v. Turkey, GC, at 90.

<sup>324</sup> Öneriyıldız v. Turkey, GC, at 102.

These considerations led the Grand Chamber unanimously to conclude that the State officials and authorities had not done everything within their power to protect the victims from the dangers to which they were exposed, thus constituting a *substantive* violation of Article 2 *in its own right*.<sup>325</sup>

As to the *procedural* aspects of Article 2, the Grand Chamber recalled that this provision entailed a duty on the State to ensure, *by all means at its disposal*, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life was properly implemented and any breaches of that right were repressed and punished.<sup>326</sup> In particular, the Court asserted the importance of the instruments of criminal liability in cases of loss of life where *‘the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities.’*<sup>327</sup> In this respect, the Court maintained that the fact that those responsible for endangering life had not been charged with a criminal offence nor prosecuted *‘may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.’*<sup>328</sup> In this connection the Court found that it was its task of reviewing whether the domestic courts had submitted the case to the careful scrutiny required by Article 2, to ensure that *‘the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life’* were not undermined.<sup>329</sup>

For these reasons, the Court Stated that, on the facts of the case, the administrative remedy could not be taken into consideration for purposes of the procedural aspect of Article 2, *regardless of its outcome*.<sup>330</sup> On the other hand, the Court observed that the Turkish criminal justice system had not secured the full accountability of State officials or authorities for their role in the tragedy and the effective respect for the right to life through the deterrent instruments of criminal law.<sup>331</sup> Accordingly, the Grand Chamber held by sixteen votes to one that there had been a violation of Article 2 also in its procedural aspect.

With regard to the allegations of a breach of Article 1 of Protocol 1 to the Convention, the Government submitted that, also with reference to this provision, the Chamber had operated an undue opening to the protection of a situation that had no equals in the case law of the Court.<sup>332</sup>

The Grand Chamber agreed with the Chamber that, as the State authorities had tolerated the applicant’s actions, they had *de facto* *‘acknowledged that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods.’*<sup>333</sup> The Court therefore established that Article 1 of Protocol No. 1 to the Convention was applicable to the facts of the case.

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<sup>325</sup> Önerıldız v. Turkey, GC, at 109-110.

<sup>326</sup> Önerıldız v. Turkey, GC, at 91.

<sup>327</sup> Önerıldız v. Turkey, GC, at 93.

<sup>328</sup> Önerıldız v. Turkey, GC, at 93.

<sup>329</sup> Önerıldız v. Turkey, GC, at 96.

<sup>330</sup> Önerıldız v. Turkey, GC, at 93.

<sup>331</sup> Önerıldız v. Turkey, GC, at 117.

<sup>332</sup> Önerıldız v. Turkey, GC, at 131.

<sup>333</sup> Önerıldız v. Turkey, GC, at 127.

The Grand Chamber confirmed that the causal link between the gross negligence attributable to the State and the loss of human lives also applied to the engulfment of the applicant's house,<sup>334</sup> as the wide margin of appreciation left to States in the fulfillment of their obligations did not absolve them from *'their duty to act in good time, in an appropriate and, above all, consistent manner.'*<sup>335</sup>

Accordingly, for substantially the same reasons as those given in respect of the complaint of a violation of Article 2, the Grand Chamber found by fifteen votes to two that there had been a breach of Article 1 of Protocol No. 1 to the Convention.

Contrary to the Chamber, the Grand Chamber thought it necessary to consider the facts of the case also in the context of Article 13, *'as it does not inevitably follow that Article 13 will be violated if the criminal investigation or resultant trial in a particular case do not satisfy the State's procedural obligation under Article 2.'*<sup>336</sup> In particular, the Court stated that meanwhile under Article 2 it had to establish whether the authorities had carried out an investigation of their own motion into the cause of loss of life, satisfying certain minimal conditions and enabling the individuals concerned to obtain relief,<sup>337</sup> in the context of Article 13, vice versa, it was a matter of determining whether *'the applicant's exercise of an effective remedy was frustrated on account of the manner in which the authorities discharged their procedural obligation under Article 2.'*<sup>338</sup>

The Grand Chamber observed that the administrative remedy available to the applicant was in *abstracto* suitable to offer redress to his complaints. However, the practical enforcement of this instrument had proved defective, due to excessive lengths of the proceedings and non-enforcement of the judgments. The Grand Chamber concluded, by fifteen votes to two, that domestic authorities had failed to provide the applicant with an effective remedy for the breach of the substantive right protected under Article 2 of the Convention.

As to breach of Article 1 of Protocol 1, the Grand Chamber agreed with the Chamber that domestic authorities had failed to protect the interest of the applicant, which amounted to a *de facto* proprietary right. The Court reiterated the remarks made in connection with the inadequacy in the administrative proceedings under Article 2, concluding that *'in so far as these advantages have proved incapable of removing from the applicant his status as the victim of an alleged violation of Article 1 of Protocol No. 1, they cannot a fortiori deprive him of his right to an effective remedy in order to obtain redress for that alleged violation.'*<sup>339</sup>

The Grand Chamber did not consider it necessary to proceed to scrutinise the facts of the case also on grounds of the provisions under Article 6 and 8 of the Convention. In awarding compensation to the applicant, the Court substantially reconfirmed the overall assessment of the Chamber, granting to the applicant and his children 143,770 EUR for non-pecuniary damage and 2,000 USD for pecuniary damage.

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<sup>334</sup> Öneriıldız v. Turkey, GC, at 135.

<sup>335</sup> Öneriıldız v. Turkey, GC, at 128.

<sup>336</sup> Öneriıldız v. Turkey, GC, at 148.

<sup>337</sup> Öneriıldız v. Turkey, GC, at 149.

<sup>338</sup> Öneriıldız v. Turkey, GC, at 149.

<sup>339</sup> Öneriıldız v. Turkey, GC, at 156.

The decisions of the *Öneryıldız v. Turkey* case may be regarded as landmarks in the matter of access to justice in environmental matters in several respects. Here for the first time the Court uncontroversially established that public authorities are required to take measures to prevent infringements of the right to life as a result of the exercise of dangerous activities such as waste storage.

In the Court's opinion, this involved putting in place legislative and administrative frameworks governing the exercise of dangerous activities;<sup>340</sup> measures granting public access to information concerning such activities;<sup>341</sup> and appropriate procedures for identifying shortcomings in the exercise of such activities.<sup>342</sup>

On the preventive side, public authorities were required to put in place legislative and administrative frameworks including '*the licensing, setting up, operation, security and supervision*' of the waste storage, making it compulsory for all those concerned to '*take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.*'<sup>343</sup> The Court exercised close scrutiny of the action taken by the State authorities, concluding that, although it is was not its task of substituting the views of domestic authorities, it observed that '*the timely installation of a gas-extraction system (...) before the situation became fatal could have been an effective measure.*'<sup>344</sup>

The fact that the Court was ready to stress the importance of prevention of the loss of life through the implementation of environmental regulations represents a decisive novelty within the framework of the Convention. Even more, the fact that the Court proved willing to scrutinise the domestic authorities' actions in this respect breaks new grounds as to the traditional deference to State s' margin of appreciation, as shown by the remarks concerning the practical measures that could have been adopted.<sup>345</sup>

These data seem to confirm a new attitude in the Court, which proved itself willing to go into the merits of domestic authorities' decisions, as seen in the context of the case law under Article 8. Also in the *Öneryıldız* case the Court was faced with a situation of widespread breach of domestic regulations. Contrary to Article 8, though, domestic illegitimacy is not a prerequisite for the application of Article 2.

The *Öneryıldız* judgments placed particular emphasis on the public's right to information concerning such activities, extending to Article 2 the principles elaborated in the context of Article 8.<sup>346</sup> Additionally, the Court stressed the crucial importance of appropriate procedures '*for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels,*'<sup>347</sup> in order to provide '*effective deterrence against threats to the right to life.*'<sup>348</sup>

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<sup>340</sup> *Öneryıldız v. Turkey*, GC, at 89-90.

<sup>341</sup> *Öneryıldız v. Turkey*, GC, at 90.

<sup>342</sup> *Öneryıldız v. Turkey*, GC, at 90.

<sup>343</sup> *Öneryıldız v. Turkey*, GC, at 90.

<sup>344</sup> *Öneryıldız v. Turkey*, GC, at 107.

<sup>345</sup> Cf. *Öneryıldız v. Turkey*, GC, at 90: '*The licensing, setting up, operation, security and supervision*' of the waste storage, making it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.'

<sup>346</sup> *Öneryıldız v. Turkey*, GC, at 90; cf. case of *Guerra and others v Italy*, at 60.

<sup>347</sup> *Öneryıldız v. Turkey*, GC, at 90.

<sup>348</sup> *Ibidem*.

These general conditions are well-established in the context of law enforcement under Article 2, according to which, if infringement of the right to life is not intentional, civil, administrative or even disciplinary remedies may be a sufficient response.<sup>349</sup> In the Öneriyıldız judgment, however, the Court, found that where the public authorities knew of certain risks and knew that the consequences of not taking action to reduce those risks could lead to the loss of life, then the State was under an obligation to prosecute those responsible for criminal offences.<sup>350</sup> Hence an enlargement of the guarantees of Article 2 in the field of activities that, in the words of the respondent State, did not fall within the notion of activities posing *an immediate danger within the meaning of the Court's case law*.<sup>351</sup>

The core of the authorities' wrongdoing appears to have been their failure to discourage the applicant and other slum dwellers from living near the waste tip creating the risks. This interpretation, though, has been criticised by some commentators as constructing *a bridge of dubious logicity* between the use of lethal force, in the Article 2 sense and the Government's omission to remove the slum dwellers from the risks posed by the waste storage site.<sup>352</sup> The Court seems indeed to have placed a great burden upon State authorities.

This interpretation of Article 2 leaves the observer wondering how State authorities could have shifted the risk to the individual, discharging their obligations to protect the right to life. In the Öneriyıldız case the assessment was relatively easy, as domestic authorities had not put in place any preventive measures to safeguard the lives of the slum population, nor they had made any effort to inform them of the risks they run, albeit these had been clear for a substantial amount time. In this respect, it seems fair to assume that, had public authorities seriously attempted to evict the applicant, making clear of the risks he would have run otherwise, the Court would have probably taken a different decision. It is however worth remembering that the Court expressly mentioned that in absence of more practical measures to avoid the risks to the lives of the slums' inhabitants, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.<sup>353</sup>

The Chamber and Grand Chamber took different standpoints as to interpretation of obligations under Article 2. Meanwhile the Chamber had subordinated the finding of a violation of Article 2 to a breach of its procedural guarantees, the Grand Chamber distinguished the two issues.<sup>354</sup> In this regard, the Grand Chamber found that there was a need to assess the facts of the case also under Article 13, clarifying the role of this provision in the context of Article 2 (cf. *retro*).

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<sup>349</sup> Öneriyıldız v. Turkey, GC, at 94. Cf. Vo v France, GC, Application No. 53924/00, at 90; Calvelli and Ciglio v Italy, GC, No. 32967/96, at 51; Mastromatteo v Italy, Application No. 37703/99, GC at 90, 94 and 95.

<sup>350</sup> Cf. Öneriyıldız v. Turkey, GC, at 93: 'Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realizing the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity (see, mutatis mutandis, Osman, at 116), the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2'.

<sup>351</sup> Öneriyıldız v. Turkey, GC, at 77.

<sup>352</sup> Case review for one Crown Row, R. available at: [www.lcor.com](http://www.lcor.com).

<sup>353</sup> Öneriyıldız v. Turkey GC, at 108

<sup>354</sup> Öneriyıldız v. Turkey GC, at 88.

As to violation of Article 1 of Protocol 1 to the Convention, the Court established that governments have duties to protect persons occupying land without planning permission. In effect the Court seems to have recognised that tolerance of national authorities constituted a valid criterion for the determination of possession, thus departing from the consolidated notion elaborated in its case law.<sup>355</sup> In particular, the Court seems to have acknowledged that State authorities cannot dispute the title to land unless they are in a position to claim that they have undertaken some action to evict the applicants from unlawfully occupied land.<sup>356</sup> This view has raised some criticisms<sup>357</sup> and it remains to be seen whether the Court will prove willing to stick with it.

Overall, the call for effectiveness of domestic regimes concerning dangerous activities made in this judgment is most interesting when one considers the well-known problem of lack of enforcement of environmental regulations. The line established by the Court's decision allows predicting that the right to life may be employed to complain of domestic authorities' failure to implement environmental legislation, as far as it is aimed to protect from risks to human life. The Court is not going to be satisfied with purely theoretical risks and only very serious threats can fit into the pattern drawn by the *Öneryıldız* decision. Accordingly, the identification of a clear and direct casual link would remain the most crucial hurdle to overcome to present claims based on analogous grounds.

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<sup>355</sup> Ibidem.

<sup>356</sup> Cf. contra *Chapman v UK*, where the Court had established that it would be slow 'to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site', *Chapman v UK*, Application No. 27238/95, at 102.

<sup>357</sup> Case review for one Crown Row, cit.



#### 4. Procedural rights: the right to a fair trial, the right to a remedy and the right to access to information

Environmental protection may hugely benefit of the implementation of procedural guarantees associated with existing civil and political rights, which could allow citizens to play a substantial role in the control on environmentally sensitive human activities and the implementation of environmental regulations. The Council of Europe's Committee of Ministers has recognised the need to '*emphasise the need to strengthen environmental protection at national level, notably as concerns access to information, participation in decision-making processes and access to justice in environmental matters.*'<sup>358</sup> These undertakings also represent the object of the Aarhus Convention,<sup>359</sup> signed by many contracting parties to the European Convention of Human Rights. This section will ascertain how the procedural guarantees laid out in the Convention may operate within this context.

##### *The right to a fair trial*

According to Article 6 (1) of the Convention:

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment will be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the Court's opinion in special circumstances where publicity would prejudice the interests of justice.*

The right to a fair trial enshrined in Article 6 is one of the cornerstones of the rule of law. The norm applies to both civil and criminal proceedings. The present paper, however, will confine itself only to analyse the deployment of this provision with regard to *civil rights and obligations*. In this connection, Article 6 works as a procedural safeguard for the protection of the rights laid out in domestic law, granting access to a fair and public hearing before an impartial and independent tribunal established by law. The right entails access to a public judgment within a reasonable time and in respect of the principle of equality of arms. Article 6 does not just cover the right to instigate proceedings to which the fair standards will apply, but also extends to the execution of sentences.<sup>360</sup>

According to the Court's established case law, in order to fall within the field of application of Article 6, civil rights and obligations that may be at least arguably said to be recognised under domestic law must be the object of a dispute, *which is directly decisive* to them.<sup>361</sup>

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<sup>358</sup> CM/860/21012004, adopted on 23 January 2004.

<sup>359</sup> ECE/CEP/43 adopted on 25 June 1998 by the United Nations Economic Commission for Europe and entered into force on 30 October 2001. Cf. retro, Chapter 1.

<sup>360</sup> *Hornsby v Greece*, Application No. 18357/91, at 40: 'Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6.'

<sup>361</sup> Cf. *Le Compte, Van Leuven and De Meyere v. Belgium*, Application No. 7496/76, at 47.

Article 6 does not guarantee any particular content in the substantive law of Contracting States and merely relates to *whatever substantive legal rights and obligations a State in its discretion provides*.<sup>362</sup> The notion of *civil rights and obligations* has autonomous Convention meaning, which has not been defined in general terms. In this regard, the Court makes reference to the *character*, the *substantive content* and *effects* of rights<sup>363</sup> and, subsidiarily, to their legal classification in domestic law and the existence of a *uniform European notion* on the matter.<sup>364</sup>

Article 6 comes into play when a civil right or obligation is the subject of a *dispute*.<sup>365</sup> The contestation may relate both to a question of law or fact and may concern the existence and the scope of a right, or the manner in which it is exercised.<sup>366</sup> There is no need for the victim to be in a position to claim for damage and a request for declaratory judgment is sufficient. Equally, it is not necessary that both parties are private persons,<sup>367</sup> and the right may also be invoked by citizens' associations bringing proceedings in order to defend the interests of their members.<sup>368</sup>

The dispute must be *arguable, genuine and serious*, entailing that the applicant's arguments are *sufficiently tenable*, but not necessarily well-founded in terms of domestic legislation.<sup>369</sup> The outcome of the dispute must be *decisive* for the rights in question. In this respect, the Court has established that '*tenuous connections or remote consequences are not sufficient*.'<sup>370</sup>

In considering claims under Article 6 the Court scrutinizes the legitimate aim and proportionality of the measures deployed in domestic law, as '*it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (...) if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons*.'<sup>371</sup>

Article 6 is one of the most litigated provisions of the Convention and its broad spectrum of protection may apply to some environmental interests.<sup>372</sup> Domestic legislation in fact may contain individual entitlements associated with certain environmental conditions, such as the right to a clean environment provided by some European Constitutions, amounting to *civil rights* within the meaning of Article 6. Equally, this provision may work as a procedural guarantee of domestic law schemes

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<sup>362</sup> H v Belgium, Application No. 8950/80, at 40: 'Article 6 § 1 (art. 6-1) extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States.'

<sup>363</sup> König v Germany, Application No. 6232/73, at 89-90.

<sup>364</sup> Feldbrugge v Netherlands, Application No. 8562/79, at 29.

<sup>365</sup> Le Compte, Van Leuven and De Meyere v. Belgium, cit., at 47 and, later, Balmer Schaforth and others v Switzerland, cit., at 32.

<sup>366</sup> Fayed v UK, Application No. 17101/90, at 65.

<sup>367</sup> Ringeisen v Austria, Application No. 2614/65, at 94.

<sup>368</sup> Gorraiz Lizarraga and others v Spain, Application No. 62543/00, at 46.

<sup>369</sup> Neves e Silva v Portugal, Application No. 11213/84, at 37.

<sup>370</sup> Cf. Le Compte, Van Leuven and De Meyere v. Belgium, cit., at 47: 'The Court considers that a tenuous connection or remote consequences do not suffice for Article 6 par. 1.'

<sup>371</sup> Fayed v UK, cit., at 65.

<sup>372</sup> See Balmer-Schafroth and others v. Switzerland, at 33; Athanassoglou and others v. Switzerland, at 44; Taskin and others v. Turkey, at 90.

that enable concerned individuals to institute public law proceedings for the enforcement of environmental regulations. In spite of these theoretical possibilities, the early decisions taken in this field were fairly discouraging.

In *Balmer-Schafroth and others v Switzerland*,<sup>373</sup> for example, the applicants were 10 Swiss nationals who lived near a nuclear power station and had tried to object to the renewal of the plant's operating licence, arguing that it was obsolete and threatened the lives and health of the neighbouring population. The Swiss Federal Council had recognised the applicants' entitlement to present their objections, but it had set them aside as unfounded, granting a renewed licence as requested. In their submissions to the European Court of Human Rights, the applicants complained of not having had access to a *tribunal* within the meaning of Article 6. They further alleged a breach of their rights under Article 13 for lack of access to an effective remedy.

The Swiss Government disputed the status of the applicants as *victims* within the meaning of the Convention. The Court rejected this argument, finding that the fact that the Federal Council had declared the applicants' objections admissible justified regarding them as victims under the Convention.<sup>374</sup> As it proceeded to examine the facts of the case under Article 6, the Court observed that the right to have physical integrity adequately protected from risks associated with the use of nuclear energy was recognized by Swiss law, therefore constituting a *civil right*.<sup>375</sup> The Court further found that there had been a *dispute* over this right, as the substantial nature of the decision of the Federal Council was '*more akin to a judicial act than to a general policy decision*.'<sup>376</sup>

As the Court went on to consider whether this decision had also been *decisive* to the applicants' rights, it found that the latter had failed to show that the operation of the power station exposed them *personally* to a danger that was *not only serious* but also *specific and, above all, imminent*.<sup>377</sup> In the absence of such evidence, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings *directly decisive* within the meaning of the Article 6.<sup>378</sup> Accordingly, since the connection between the Federal Council's decision and the right invoked by the applicants was too *tenuous and remote*, the Court concluded that neither Article 6 nor Article 13 were applicable to the facts of the case.

The ruling was by a majority. A 7 judges minority compiled a dissenting opinion disputing that the link between the operating licence and the applicants' rights was *too tenuous*.<sup>379</sup> The dissenting judges also observed that the applicants had not sought to challenge the Swiss energy policies *in abstracto*, further commenting that:

*'What applies to the supervision of quarries, motorways and waste-disposal sites applies a fortiori to nuclear energy and the operation of power stations required to comply with safety standards. If there is a field in which blind trust cannot be placed*

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<sup>373</sup> *Balmer-Schafroth and others v Switzerland*, Application No. 22110/93.

<sup>374</sup> *Balmer-Schafroth and others v Switzerland*, at 26.

<sup>375</sup> *Balmer-Schafroth and others v Switzerland*, at 34.

<sup>376</sup> *Balmer-Schafroth and others v Switzerland*, at 37.

<sup>377</sup> *Balmer-Schafroth and others v Switzerland*, at 40.

<sup>378</sup> *Ibidem*.

<sup>379</sup> Dissenting opinion by Judges Pettiti, Golcuklu, Walsh, Russo, Valticos, Lopes-Rocha and Jambrek, appended to the judgement.

*in the executive, it is nuclear power, because reasons of State, the demands of government, the interests concerned and pressure from lobbyists are more pressing than in other spheres.*<sup>380</sup>

In spite of the advanced standpoint taken by the dissenting judges, the reasoning applied in the *Balmer-Schafroth* case was confirmed in *Athanassoglou and others v Switzerland*<sup>381</sup> and *Asselbourg and others v Luxembourg*.<sup>382</sup>

The case of *Athanassoglou and others v Switzerland* dealt with a situation virtually identical to that complained of in the *Balmer-Schafroth* case. The applicants asked the Court to distinguish between the procedural right to examination by a domestic court of the governmental decision to grant an extension of the operating licence of a nuclear power plant and, on the other hand, the possible right to have the plant closed under national law.<sup>383</sup> As far as the procedural Convention right was concerned, they maintained, it should be sufficient only to prove the serious nature of the risk. If proof of immediate danger in the sense of imminent risk of serious accident had to be furnished, there would no longer have been any difference in practice between procedural and substantive law.<sup>384</sup>

The Court rejected this argument, finding that there was no material difference between the present case and that of *Balmer-Schafroth and others v Switzerland*.<sup>385</sup> In the Court's opinion, the applicants had sought to derive from Article 6 a remedy to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the government to the courts the responsibility for taking the ultimate decision on the operation of individual nuclear power stations.<sup>386</sup> The Court, however, considered that how best to regulate the use of nuclear power was a policy decision for each Contracting State to take according to its democratic processes and that it was not for it to examine the hypothetical question whether, if the applicants had been able to demonstrate a *serious, specific and imminent danger*, the national remedies would have been sufficient to satisfy the Article requirements.<sup>387</sup>

Consequently, the Court found that there had been no violation of Article 6. The same reasoning was applied in *Asselbourg and others v Luxembourg*, for whose analysis cf. *retro*, Chapter 2. In these decisions the Court placed a heavy burden of proof on the applicants, displaying clear closure to any attempts to rely on Article 6 made by individuals concerned for the implementation of domestic regulations on the exercise of hazardous activities.

In 2003, nevertheless, a new view emerged, with the decision of *Kyrtatos v Greece*.<sup>388</sup> As recalled earlier in this paper,<sup>389</sup> the applicants were two Greek citizens owning a property near a nature reserve, who claimed that the building of an urban development adjacent to their home had led to the destruction of their physical environment, in

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<sup>380</sup> *Ibidem*.

<sup>381</sup> *Athanassoglou and others v Switzerland*, Application No. 27644/95.

<sup>382</sup> *Asselbourg v Luxembourg*, Application No. 29121/95.

<sup>383</sup> *Athanassoglou and others v Switzerland*, at 38.

<sup>384</sup> *Ibidem*.

<sup>385</sup> *Athanassoglou and others v Switzerland*, at 51.

<sup>386</sup> *Athanassoglou and others v Switzerland*, at 53.

<sup>387</sup> *Athanassoglou and others v Switzerland*, at 54.

<sup>388</sup> *Kyrtatos v Greece*, Application No. 41666/98.

<sup>389</sup> Cf. Chapter 2.

breach of their rights under Article 8.<sup>390</sup> The Court rejected this claim as unfounded. The applicants, however, also complained of domestic authorities' failure to comply with two final decisions that had annulled the building permits for the urban development. These judgments were grounded on constitutional provisions on the protection of the natural environment.<sup>391</sup> The applicants argued that the failure to enforce these decisions, together with the length of the related proceedings, had breached their rights under Article 6.

The Court observed that the right to a fair trial '*would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.*'<sup>392</sup> Accordingly, in the Court's opinion the Greek authorities had breached the applicants' rights under Article 6 by refraining for more than 7 years from taking the necessary measures to comply with two final judicial decisions. The Court equally found a breach of the same provision in the length of the proceedings complained of and the applicants were awarded 10,000 and 20,000 EUR respectively for non-pecuniary damage.

This was the first decision in which the Court applied the well-established principles elaborated under Article 6 to an *environmental case*, based upon the right to a healthy environment protected in a national Constitution. The fact that the applicants could rely on a ruling by a domestic court represented the landmark distinguishing this case from the precedent set in *Balmer-Schafroth and others v Switzerland*. This feature characterized the developments in Article 6 jurisprudence over the following years.

In 2004 the decision of *Taskin and others v Turkey*<sup>393</sup> reconfirmed the application of Article 6 to *environmental cases*. As recalled earlier in this paper, the applicants argued that the operation of a gold mine near their homes posed a threat to human health, wildlife and water supplies, causing them to suffer the consequences of environmental damage.<sup>394</sup> They maintained that the permits issued to the mine and the related decision-making process violated their rights under Articles 2 and 8 of the Convention further claiming that they had been denied access to effective judicial protection, contrary to Article 6 and 13.

The Government disputed that Article 6 applied to the facts of the case, as the risks complained of by the applicants were too remote to constitute civil rights relevant to the Convention. The Court, however, found that, in the instant case, the fact that the domestic courts had acknowledged breach of the applicants' rights was sufficient to conclude that there had been a *genuine dispute* over a civil right, relevant to the purposes of Article 6. In this respect, the Court also established that domestic authorities' failure to comply with the ruling of national courts had deprived Article 6

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<sup>390</sup> Kyratos v Greece, at 44.

<sup>391</sup> Cf. Kyratos v Greece, at 12: 'The basic argument of the applicants before the Supreme Administrative Court was that the prefect's decisions and consequently the building permits, were illegal because in the area concerned there was a swamp and Article 24 of the Greek Constitution, which protects the environment, provided that no settlement should be built in such a place.' And at 13: 'The decision was found to have violated Article 24 of the Constitution, which protects the environment, because the redrawing of the boundaries of the settlements put in jeopardy the swamp in Ayios Hyannis, an important natural habitat for various protected species (such as birds, fishes and sea-turtles). It followed that the building permits were also unlawful and had to be quashed.'

<sup>392</sup> Kyratos v Greece, at 30.

<sup>393</sup> Taskin and others v Turkey, Application No. 46117/99.

<sup>394</sup> Taskin and others v Turkey, at 13.

of any useful effect.<sup>395</sup> It is furthermore notable that the judgment contained a section mentioning the Rio Declaration on Environment and Development<sup>396</sup> and the Aarhus Convention amongst *the relevant international texts on the right to a healthy environment*.<sup>397</sup>

These findings seemed to constitute an evolution in the Court's jurisprudence, comparable to that observed under Article 8. As may be recalled, once established that the Court was not willing to rule against policies considered legitimate at the domestic level (cf. *Hatton and others v UK*), applicants started to bring successful *environmental* claims under Article 8 with reference to situations that had been acknowledged illegitimate by domestic courts (*Taskin and others v Turkey* and subsequent case law). Analogously, in the context of Article 6, although the Court was not willing to go against the findings of domestic courts in matters of access to justice in environmental controversies (*Balmer-Schafroth and others v Switzerland*), it acknowledged claims grounded on domestic judgments that had remained unenforced, (*Kyrtatos v Greece* and subsequent case law).

This line saw a further interesting development in 2005, with the decision of *Okay and others v Turkey*.<sup>398</sup> The applicants were 10 Turkish nationals complaining of domestic authorities' failure to implement an order to shut down three highly polluting thermal-power plants. All the applicants were lawyers who lived and practised in the city of Izmir, about 250 kilometres from the sites subject to dispute.<sup>399</sup> They had successfully challenged the operation of the plants before the domestic courts, relying on their constitutional right to live in a healthy and balanced environment and on the related duty to prevent environmental pollution. The domestic courts had ordered the closure of the plants, but their decisions had never been enforced. According to the applicants, this amounted to a breach of their rights under Article 6.

The Government disputed that the applicants were in a position to invoke a breach of their right to a fair hearing in the determination of their civil rights, as they could not claim to have a *right* under domestic law, but rather a mere *interest*.<sup>400</sup> The Government furthermore argued that the applicants had failed to show that the power plants' operation exposed them personally to a danger that was *serious, specific and imminent*. In this respect, the Government observed that the applicants had not at any stage claimed of having suffered any economic or other loss, but, admittedly, they were simply concerned about their country's environmental policies and wished to live in a healthier environment. Consequently, in the Government's submissions, the proceedings at issue were not directly decisive to the applicants' civil rights.<sup>401</sup>

The Court found that, although the applicants had not claimed of having suffered any specific loss, they had relied on their constitutional right to live in a healthy and balanced environment, which had been regarded as sufficient to ground their claim by

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<sup>395</sup> *Taskin and others v Turkey*, at 133.

<sup>396</sup> The Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. 1).

<sup>397</sup> *Taskin and others v Turkey*, at 95.

<sup>398</sup> *Okay and others v. Turkey* Application No. 36220/97.

<sup>399</sup> It is interesting to note that some of the applicants were the legal advisors in the case of *Taskin and others v Turkey*.

<sup>400</sup> *Okay and others v. Turkey*, at 62.

<sup>401</sup> *Okay and others v. Turkey*, at 61.

domestic courts. This satisfied the Court as to the existence of a dispute over a civil right.<sup>402</sup>

As to the Government's submissions that the applicants had failed to show that the power plants' operation exposed them personally to a danger, which was *serious, specific and imminent*, the Court noted that, according to the domestic courts' findings, the hazardous gases emitted by the power plants extended to an area 2,350 kilometres in diameter. The Court noticed that the distance reached to cover the area where the applicants lived, causing some interference with their right to the protection of their physical integrity, making the dispute *decisive* to the civil rights at stake. The Court explicitly elaborated that the present case differed from the authorities relied on by the Government, notably the *Balmer-Schafroth* and *Athanassoglou* cases, where the applicants had been unable to secure a ruling by a tribunal on their objections to the extension of the operating permits of nuclear power plants.<sup>403</sup>

The Court further highlighted that the domestic courts had recognized the applicants' right to demand the suspension of the power plants' activities and to set aside the administrative authorities' decision to continue to operate them. In the Court's opinion, any administrative decision to refuse or circumvent these judgments paved the way for compensation. As the execution of judicial decisions was an integral part of the right to a fair trial, the Court concluded that there had been a breach of the applicants' rights under this provision.<sup>404</sup>

The applicants had not claimed compensation for pecuniary damage or costs and expenses, but they had claimed non-pecuniary damage for the emotional suffering and distress caused by the non-enforcement of the administrative courts' decisions. The Court awarded them the sum of 1,000 EUR each under this head.

The contextualisation of this decision in the case law of the Court highlights some interesting features. The case bears clear similarities to the decision of *Taskin and others v Turkey*, under its Article 6 limb, as both claims related to the lack of enforcement of domestic judicial decisions. In both instances, the applicants had relied on their constitutional right to a healthy environment granted by national constitutions. The most significant difference between the two, however, is that, although none of the applicants could claim for actual damage to their personal sphere, in *Taskin and others v Turkey* the applicants resided in the very area where the mine was in operation; meanwhile in *Okay and others v Turkey* they resided 250 kilometres away. This detail clearly affected the level of risk to which they were exposed, which was '*not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants.*'<sup>405</sup>

In *Okay and others v Turkey* the applicants could not prove nor did they seek to prove any physical or material damage to their persons or property, but rather relied on their constitutional right to a healthy and clean environment and on their interest in obtaining observance of domestic regulations. These features confer on the case some

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<sup>402</sup> *Okay and others v. Turkey*, at 65.

<sup>403</sup> *Okay and others v. Turkey*, at 68.

<sup>404</sup> *Okay and others v. Turkey*, at 73.

<sup>405</sup> *Okay and others v. Turkey*, at 66.

characteristics of a *class action*, grounded on generic public interest, rather than on an individual right.

In conclusion, it seems to be possible to maintain that, after the *Kyrtatos v Greece* judgment, the Court considered that the applicants' constitutional rights to a healthy environment were *civil rights* relevant to the purposes of Article 6. These decisions pave the way for access to the European Court of Human Rights to citizens taking action for environmental protection in States whose constitutions provide for a right to a healthy environment, whenever their right of standing is acknowledged by domestic courts. The Court seems to have progressively taken the standpoint of not asking applicants to demonstrate a *serious, specific and imminent danger* in their personal regard, being satisfied by the assessment carried out by domestic courts in this respect.

### Equality of arms

The principle of *equality of arms* is another feature of the right to a fair trial, requiring that '*each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.*'<sup>406</sup> States enjoy a wide margin of discretion as to the means to be used in guaranteeing litigants this right, the institution of legal aid being one of these means. According to the Court's established jurisprudence, the question whether the provision of legal aid is necessary to a fair hearing must be determined on the basis of the particular facts and circumstances of each case and depends, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>407</sup>

The Court has long confined itself into applying this principle to civil cases only in exceptional circumstances, where the provision of legal aid was *indispensable* for effective access to court. A most interesting occasion for testing the use of this norm in the context of claims of an environmental nature occurred in *Steel and Morris v UK*.<sup>408</sup> The claim related to the possibility of resort to the principle of the equality of arms under Article 6 in cases of defamation associated with environmental campaigns.

The applicants were two activists belonging to a local British NGO that had been campaigning against the McDonald's corporation. The campaign included allegations that McDonald caused starvation in developing countries, destruction of tropical forests and torture and murder of animals. McDonald had brought a legal action against the applicants, claiming damage for defamation. The applicants, who disposed of little financial resources, had applied for legal aid, but their application was refused and they were forced to represent themselves throughout the whole of the proceedings. The trial was the longest in English legal history and resulted in the condemnation of the applicants to pay damage for 36,000£ and 40,000£ respectively.

Before the European Court of Human Rights the applicants complained that they had

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<sup>406</sup> De Haes and Gijssels v Belgium, Application No. 19983/92, at 53.

<sup>407</sup> Airey v Ireland, Application No. 6289/73, at 26.

<sup>408</sup> Steel and Morris v UK, Application No. 68416/01.



been denied a fair trial because of the lack of legal aid. Although they had received *pro bono* assistance by barristers and solicitors, the applicants maintained that the domestic proceedings had been impaired by a staggering inequality of arms, resulting into a violation of Article 6. The Government, on the other hand, submitted that, according to the consolidated jurisprudence of the Court, the non-availability of legal aid in cases of defamation had never been found to be in breach of the Convention. The Government further submitted that the present case did not display any exceptional circumstances that would make legal aid indispensable for effective access to court.

The Court disagreed with these submissions. In its opinion, the circumstances of the case - namely the fact that the applicants had not chosen to commence defamation proceedings, but had acted as defendants in order to protect their right to freedom of expression, together with the financial impact of the domestic courts' decisions and the complexity of the case at issue - demanded an assessment of the extent to which the applicants had been able to bring an effective defence.<sup>409</sup> In this regard, the Court established that the disparity between the respective levels of legal assistance was of such a degree that it had given raise to unfairness.<sup>410</sup>

Accordingly, the Court concluded that the denial of legal aid had deprived the applicants of the opportunity to present their case effectively before a court, with breach of Article 6. The claim further contained an Article 10 limb, which will be analyzed further in this Chapter. The applicants were awarded respectively 20,000 and 15,000 EUR in compensation for non-pecuniary damage and 47,311£ in legal expenses.

This judgment introduced an important instrument for campaigners with environmental concerns attempting to challenge the policies of private corporations. In this respect, the Court acknowledged that, although it lay within the Contracting Parties' discretion whether to allow corporations to sue in defamation, this remedy needed to be accompanied by the safeguard of countervailing interests of freedom of expression and open debate, through the provision of instruments of legal aid.<sup>411</sup> This decision therefore marked a fairly advanced protection of the role of campaign groups in stimulating public discussion on environmental matters, consistently expanding the application of legal aid guarantees under Article 6.

### ***The right to a remedy***

According to Article 13 of the Convention:

*Everyone whose rights and freedoms as set forth in this Convention are violated will have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

Article 13 enshrines the right to an effective national remedy for violations of the rights contained in the Convention. As emerges from the *travaux préparatoires*, the

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<sup>409</sup> Steel and Morris v UK, at 67.

<sup>410</sup> Steel and Morris v UK, at 72 and 98.

<sup>411</sup> Steel and Morris v UK, at 95.

aim of this norm is to provide a means whereby individuals can obtain relief at the national level for violations of rights set out in the Convention, before having to resort to the complaint machinery before the European Court of Human Rights.<sup>412</sup>

According to the Court's jurisprudence, the object of Article 13 is to '*enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.*'<sup>413</sup> The norm requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority '*in order both to have his claim decided and, if appropriate, to obtain redress.*'<sup>414</sup> Thus Article 13 must be interpreted as guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated.

The protection afforded by this norm is auxiliary to that provided by the substantive rights listed in the Convention. However, violations of Article 13 do not depend on the finding of breaches of substantive provisions and, in this respect, it is simply enough that an *arguable claim* be made, although not manifestly unfounded.<sup>415</sup> The Court has not elaborated a general definition of *arguability*, making its assessment on a case-by-case basis.<sup>416</sup> The substantive rights invoked, are material to identify the States' obligations in each case.

The criterion of effectiveness requires that domestic systems provide the possibility to dispute a breach of the Convention with a realistic hope of success. Applicants are not entitled to a favorable decision; however, should the domestic authority find their arguments well-founded, they must grant of an effective remedy. The guarantees under Article 13 are less stringent than those provided by Article 6. The competent authorities do not need to be *judicial*, but the decision-maker must be sufficiently independent of the authority allegedly responsible for the violation of the Convention. Although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of instruments provided under domestic law may do so.<sup>417</sup>

Article 13 constitutes *lex generalis* compared with Article 6 and often the norms are invoked together. In the environmental field, the provision finds more frequent deployment with reference to the right to life, the right to respect for one's home, private and family life and the right to the peaceful enjoyment of one's possessions. In particular, the Court has proved willing to consider Article 13 claims also when it has already acknowledged a *procedural breach* of a substantive right provided by the Convention.

This was the case in *Öneryildiz v. Turkey*, discussed earlier in this paper.<sup>418</sup> Although it had already acknowledged that the national authorities' conduct in relation to the death of the applicants' relatives had led to a procedural breach of Article 2, the Court

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<sup>412</sup> Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, vol. II, pp. 485 and 490 and vol. III, p. 651

<sup>413</sup> *Keenan v UK*, Application No. 27229/95, at 123; *Hatton and others v UK*, GC, cit., at 140.

<sup>414</sup> *Klass and others v Germany*, Application No. 5029/71, at 64.

<sup>415</sup> *Powell and Rayner v UK*, at 31–33.

<sup>416</sup> *Boyle and Rice v. UK*, Application No. 9659/82 and 9658/82, at 55

<sup>417</sup> *Silver v UK*, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, at 113.

<sup>418</sup> *Öneryildiz v. Turkey*, Application No. 48939/99.

also went on to scrutinize the facts of the case in the light of Article 13.<sup>419</sup> In this respect, the Court specified that, while under Article 2 it had to establish whether the authorities had carried out an investigation of their own motion into the cause of loss of life, satisfying certain minimal conditions and enabling the individuals concerned to obtain relief,<sup>420</sup> in the context of Article 13 it was a matter of determining whether *'the applicant's exercise of an effective remedy was frustrated on account of the manner in which the authorities discharged their procedural obligation under Article 2.'*<sup>421</sup>

The Court observed that the applicant had been in a position to use the remedies available under Turkish law.<sup>422</sup> However, in the Court's opinion, these proceedings were incapable of delivering an effective remedy in practice.<sup>423</sup> The Court criticized the ineffectiveness of the domestic compensation proceedings, concluding that there had been a violation of Article 13.<sup>424</sup> The same reasoning was applied with reference to the violation of applicant's right to the enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention.<sup>425</sup>

As far as Article 8 claims are concerned, applicants have sought to deploy Article 13 to challenge domestic policies against which they had no remedy under domestic law. In *Powell and Rayner v UK*,<sup>426</sup> the applicants disputed the acceptability of the noise levels permitted by air traffic regulations, complaining that they breached their rights under Article 8. Furthermore, the applicants argued that they had not had access to any remedy to complain of these violations, since domestic law exempted aerodromes from claims for nuisance. The Court was not ready to endorse these submissions, as it found that the applicants had no *arguable* claim under Article 8. Accordingly, it concluded that they were not entitled to a remedy within the meaning of Article 13.<sup>427</sup>

The Court, however, later reconsidered its view with the decision of *Hatton and others v UK*. As in *Powell and Rayner v UK*, the applicants maintained that they had not had access to private-law remedies in relation to excessive aircraft noise, as domestic law excluded liability for this kind of nuisance. They furthermore submitted that the remedy of judicial review, which they could theoretically have resorted to, did not serve the purposes of Article 13 as it merely allowed to challenge decisions on grounds of irrationality, unlawfulness or unreasonableness.<sup>428</sup>

In the Court's assessment, although the Article 8 claim had proved unfounded, it was nevertheless *arguable*, therefore entitling the applicants to a remedy under Article 13.<sup>429</sup> The Court observed that the limits posed by judicial review did not allow consideration as to whether the increase in night flights represented a justifiable

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<sup>419</sup> Cf. *Öneryıldız v. Turkey*, GC, at 148, where the Court maintained that 'it does not inevitably follow that Article 13 will be violated if the criminal investigation or resultant trial in a particular case do not satisfy the State's procedural obligation under Article 2.'

<sup>420</sup> *Öneryıldız v. Turkey*, GC, at 149.

<sup>421</sup> *Öneryıldız v. Turkey*, GC, at 149.

<sup>422</sup> *Öneryıldız v. Turkey*, GC, at 150.

<sup>423</sup> *Öneryıldız v. Turkey*, GC, at 152.

<sup>424</sup> *Öneryıldız v. Turkey*, GC, at 155.

<sup>425</sup> *Öneryıldız v. Turkey*, GC, at 157.

<sup>426</sup> *Powell and Rayner v UK*, Application No. 9310/81, cf. retro, Chapter 1.

<sup>427</sup> *Powell and Rayner v UK*, cit., at 45.

<sup>428</sup> *Hatton and others v UK*, GC, at 135.

<sup>429</sup> *Hatton and others v UK*, GC, at 137.

limitation on the right to respect for the private and family lives of those who lived in the vicinity of Heathrow Airport. In those circumstances, the scope of review by the domestic courts had not been sufficient to comply with Article 13.<sup>430</sup>

The *Hatton* judgment represented a crucial moment in the *environmental* jurisprudence of the Court. For purposes of Article 13, this decision marked the first precedent in which the norm was successfully invoked to protect the right to challenge governmental policies that affected the human environment. The finding of an arguable claim in Convention terms remained the main prerequisite in this respect. Thus in *Ashworth and others v UK*,<sup>431</sup> where the applicants sought to rely on the *Hatton* ruling to complain of the lack of an effective remedy against the noise pollution caused by a private aerodrome, different material circumstances induced the Court to conclude that there was no arguable claim under Article 8.

Article 13 may therefore apply to environmental cases only when it is possible to establish a link with a substantive right protected under the Convention. In this respect, the general principles apply and, although it is not necessary that a substantive right be violated, there needs to be an *arguable claim* that is not manifestly unfounded under the Convention.

### ***The right of access to information***

The right of access to information is essential to enable individuals to participate in decision-making and have a role in the scrutiny of government and private sector activities. The European Convention of Human Rights does not explicitly provide a right of access to information. This entitlement, however, has been the object of much litigation before the Court, as a result of the interpretation of the provisions on freedom of expression under Article 10 and of the right to respect of one's home and family life under Article 8.

Applicants have sought to rely on Article 10 in order to demand the disclosure of information by public authorities.<sup>432</sup> Thus in *Guerra and others v Italy*, recalled earlier in this paper,<sup>433</sup> the applicants complained that the authorities' failure to inform them about the hazards and procedures to be followed in the event of accident in a nearby chemical factory had infringed their *freedom to receive and impart information and ideas* as of Article 10.<sup>434</sup> The Commission agreed that this provision had to be construed as conferring an actual right to receive information on populations who had been or might be affected by an activity representing a threat to the environment.<sup>435</sup>

The Court rebutted this interpretation, maintaining that freedom to receive information prohibited governments from restricting the public from receiving information that others wish or may be willing to impart, but could not be construed

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<sup>430</sup> *Hatton and others v UK*, GC, at 142.

<sup>431</sup> *Ashworth and others v UK*, App. No. 39561/98

<sup>432</sup> For a more detailed discussion on this provision, cf. *infra*, p. 75.

<sup>433</sup> *Guerra and others v Italy*, Application No. 14967/89, cf. Chapter 2 of this paper.

<sup>434</sup> Cf. Article 10, para 1: 'Everyone has the right to freedom of expression. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article will not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

<sup>435</sup> *Guerra and others v Italy*, at 52.

as imposing on States positive obligations to collect and disseminate information of their own motion.<sup>436</sup>

The Court, nevertheless, established that the toxic emissions produced by the plant were susceptible of interfering with the applicants' right to respect for their private and family life.<sup>437</sup> In this connection, although domestic authorities were not directly responsible for the emissions, the Court observed that they had failed to spread information that was necessary to the protection of the applicants' rights.<sup>438</sup> Accordingly, the right to receive information was not grounded within freedom of expression, but was considered a procedural implication in the context of Article 8.

In this way the Court supplied a new interpretation of the State's positive obligations, including the spreading of information which might enable individuals to assess the risks of living near a hazardous site.<sup>439</sup> Already earlier in its jurisprudence, the Court had acknowledged that the protection of one's private and family life might require access to information.<sup>440</sup> However, the *Guerra and others v Italy* case was the first instance in which the Court applied this reasoning to *environmental* information.

This line was later confirmed in the judgment of *McGinley and Egan v UK*,<sup>441</sup> where the Court found that '*where a Government engages in hazardous activities (...) which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information*'.<sup>442</sup> The case related to domestic authorities' failure to disclose information about the applicants' participation in nuclear tests. The applicants maintained that the lack of access to the tests records had given place to a denial of a fair trial in the context of their applications for service disability pensions. They further argued that there had been an unjustifiable interference with their private life within the meaning of Article 8, for which they had had no effective domestic remedy, contrary to Article 13.

The Court considered that both Articles 6 and 8 were applicable to the facts of the case, but found that there had been no breach of the applicants' rights, as the remedies provided at the domestic level, (the so-called Rule 6 procedure), were sufficient to satisfy the guarantees provided by the Convention.

Similar arguments were put forward in *Roche v. UK*, decided in 2005.<sup>443</sup> With close analogy to the case of *McGinley and Egan*, the applicant complained of domestic authorities' failure to disclose his medical records relating to his participation in the testing of chemical weapons. Contrary to the previous applicants, Mr. Roche had engaged into the search of the materials independently of a procedure of application

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<sup>436</sup> *Leander v. Sweden*, Application No. 9248/81, at 74.

<sup>437</sup> *Guerra and others v Italy*, at 60.

<sup>438</sup> *Ibidem*.

<sup>439</sup> *Guerra and others v Italy*, at 60.

<sup>440</sup> *Gaskin v UK*, Application No. 10454/83, at 36-37.

<sup>441</sup> *Case of McGinley and Egan v. UK*, App. No. 21825/93 and 23414/94; cf. retro, Chapter 2.

<sup>442</sup> *Case of McGinley and Egan v. UK*, at 101: '*where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.*'

<sup>443</sup> *Roche v. UK*, Application No. 32555/96.

to obtain a pension. The applicant maintained that the lack of access to the records of his participation in the tests had breached his right to respect for private and family life. He furthermore claimed that he had not had adequate access to a court, contrary to Article 6.

In the Court's view, the applicant's uncertainty as to whether he had been put at risk through his participation in the tests could reasonably be expected to have caused him substantial anxiety and stress, amounting to an interference with his rights under Article 8.<sup>444</sup> The Court observed that, although the authorities had a positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information, they had failed to do so.<sup>445</sup> The Court further found that the present case differed from that of *McGinley and Egan* as the applicant had pursued the information independently of his application for a pension.<sup>446</sup> Accordingly, the mechanisms provided by domestic law to allow access to documentation for pension applications, (namely the Rule 6 procedure), which had been deemed to be sufficient in the previous case, could not be regarded as pertinent to the claim of Mr. Roche. The Court therefore concluded that there had been a violation both of Articles 8 and 6, awarding the applicant 8,000 EUR in compensation.

This case presented the first occasion for the Court to enforce the principle on the right to access to health records connected with the exercise of dangerous activities, firstly established in the context of the right to life with the decision of *LCB v UK*.<sup>447</sup> In that case, the applicant claimed that the State's failure to warn her parents of the possible health risks caused by her father's participation in nuclear tests had given rise to a violation of Article 2.<sup>448</sup> The Court acknowledged that '*if, on the basis of the information available to the State at the time in question, it had appeared likely that exposure of the applicant's father to radiation might have caused a real risk to her health, then the United Kingdom would have been required to act on its own motion to advise her parents and monitor her health.*'<sup>449</sup> The Court was not satisfied that, on the facts of the case, the applicant had proved a causal link between the exposure of her father to radiation and her health conditions.<sup>450</sup> Therefore the Court concluded that, given the information available to the State at the relevant time, it could not have been expected to act of its own motion to notify the applicant's parents of the risks nor to take any other special action in relation to her.

Although the claim was unsuccessful, this judgment set a precedent for the configuration of a positive obligation on State authorities to provide information necessary to the protection of rights under Article 2. The implementation of this principle led to a positive outcome in the case of *Öneryıldız v. Turkey*, discussed earlier in this paper.<sup>451</sup> There the Court established that public authorities were required to take measures to prevent infringement of the right to life as a result of exercise of dangerous activities such as waste storage. In the Court's opinion, this

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<sup>444</sup> Roche v. UK, at 161.

<sup>445</sup> Ibidem.

<sup>446</sup> Roche v. UK, at 164.

<sup>447</sup> LCB v UK, Application No. 23413/94, cf. Chapter 3.

<sup>448</sup> LCB v UK, at 24.

<sup>449</sup> LCB v UK, at 38.

<sup>450</sup> LCB v UK, at 39.

<sup>451</sup> Öneryıldız v. Turkey, Application No. 48939/99. cf. Chapter 3.

involved, *inter alia*, putting in place measures granting public access to information concerning the exercise of these activities, extending to Article 2 the principles elaborated in the context of Article 8, '*particularly as this interpretation is supported by current developments in European standards*'.<sup>452</sup>

The Court observed that the Government had not provided local inhabitants with information enabling them to assess the risks they might run as a result of living where they did.<sup>453</sup> The Court concluded that this factor, together with the negligent conduct of the State's authorities, had led to a violation of Article 2 in its substantive aspect.<sup>454</sup>

Albeit the Court's case law on access to information does not have environmental content *stricto sensu*, these precedents may be regarded as useful tools for the pursuit of information in matters of public health, which may prove of service in the protection of environmental interests, enabling to scrutinize the exercise of hazardous activities and the enforcement of environmental legislation.

### ***Freedom of expression***

Although not specifically relevant in terms of access to *environmental information*, the right to freedom of expression under Article 10 of the Convention has also met some interesting environmental developments. The norm protects the right of the individual to receive and impart information against interference by public authorities. Freedom of expression is also relevant when a private party takes legal action against another to prevent the distribution of information. Restrictions to this right must be prescribed by law and follow a legitimate aim. Furthermore, a fair balance must be struck between the interest of the individual and that of the community as a whole.

The right to distribute information on environmental matters has been found to fall within the ambit of application of Article 10. Thus in *Vides Aizsardzibas Klubs v Latvia*,<sup>455</sup> an environmental NGO claimed that a legal suit for defamation resulting from one of its campaigns had violated its freedom of expression. The dispute related to the publication of an article expressing the organization's concerns about the conservation of coastal dunes on a stretch of the Latvian coast. The article argued that the local mayor had '*signed illegal documents, decisions and certificates*' and had wilfully omitted to comply with the relevant authorities' instructions to halt illegal building works. The mayor had sued the organization in defamation. Despite having proved the well-foundedness of its factual allegation, the NGO was ordered to publish an official apology and to pay damage, as the publication had attacked the mayor in person for the acts of the entire local authority. The applicant organisation complained that this judgment had infringed the right to freedom of expression and in particular the right to impart information, as guaranteed by Article 10.

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<sup>452</sup> *Öneryıldız v. Turkey*, GC, at 90. In this connection, the Court expressly stated that, according to the relevant instruments of the Council of Europe, 'where dangerous activities are concerned, public access to clear and full information is viewed as a basic human right.' Cf. *Öneryıldız v. Turkey*, GC, at 62.

<sup>453</sup> *Öneryıldız v. Turkey*, GC, at 108.

<sup>454</sup> *Öneryıldız v. Turkey*, GC, at 110.

<sup>455</sup> *Vides Aizsardzibas Klubs v Latvia*, Application No. 57829/00.

The Court observed that the order against the applicant amounted to an interference with the exercise of its right to freedom of expression. That interference was prescribed by law and pursued a legitimate aim such as the protection of the reputation and rights of others. As it went on to consider whether a fair balance had been struck between the competing interests, the Court noted that the applicant organisation had acted with intent to draw attention to a sensitive issue of public interest. In the Court's opinion, criticism of the mayor for the policy of an entire local authority could not be regarded as an abuse of the freedom of expression. Furthermore, the Court asserted that public authorities were to be exposed to permanent scrutiny by citizens in a democratic society and that everyone should be able to draw the public's attention to situations they considered unlawful.<sup>456</sup>

Consequently, despite the discretion afforded to national authorities, the Court found that there had not been a reasonable balance between the restrictions imposed on the applicant organisation's freedom of expression and the legitimate aim pursued.<sup>457</sup> The Court concluded that there had been a violation of Article 10 and awarded to the applicant organization 3,000 EUR for non-pecuniary damage and 1,000 EUR for costs and expenses.

This decision constitutes a significant step in the protection of democratic debate on environmental issues, safeguarding the right of NGOs to campaign freely. The same principle was established in *Steel and Morris v. UK*.<sup>458</sup> As recalled earlier in this Chapter,<sup>459</sup> the applicants maintained that their campaign against McDonald had raised matters of public interest that were to be freely and openly discussed in a democracy. Accordingly, they claimed that the domestic courts' finding of their liability for defamation had been contrary to freedom of expression provided by the Convention.<sup>460</sup>

The Court found that there had been an interference with the applicants' rights under Article 10 and that this had taken place *in accordance with the law*.<sup>461</sup> The Court, however, considered that this interference could not be regarded as necessary in a democratic society. In this respect, the Court observed that the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities was an important factor to be taken into account in this context. In particular, the Court asserted that the inequality of arms and the difficulties under which the applicants laboured were significant in assessing the proportionality of interference under Article 10.<sup>462</sup> Accordingly, the Court concluded that domestic authorities had not struck a correct balance between the need to protect the applicants' freedom of expression and the need to protect McDonald's reputation, thereby violating the applicants' rights under Article 10.<sup>463</sup>

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<sup>456</sup> *Vides Aizsardzibas Klubs v Latvia*, at 42.

<sup>457</sup> *Vides Aizsardzibas Klubs v Latvia*, at 49.

<sup>458</sup> *Steel and Morris v. UK*, Application No. 68416/01.

<sup>459</sup> Cf *retro*, p. 67.

<sup>460</sup> *Steel and Morris v. UK*, at 78.

<sup>461</sup> *Steel and Morris v. UK*, at 86 – 87.

<sup>462</sup> *Steel and Morris v. UK*, at 95.

<sup>463</sup> *Steel and Morris v. UK*, at 96.



## *Some conclusions*

The European Convention of Human Rights provides a series of procedural guarantees that may find useful deployment with reference to environmental interests. First of all, numerous domestic legal systems provide public law litigation and class actions aimed to supplementing and scrutinizing governmental action in environmental matters. The procedural guarantees associated with Article 6 may offer precious support to these undertakings. In particular, applicants may invoke the protection of the Convention in order to have their environmental claims adequately heard, in so far as they rely on *civil rights* protected by domestic law. Article 13, on the other hand, supplies the right to access to an effective remedy whenever environmental interests are intertwined with one of the rights protected by the Convention, such as the right to life or the right to respect of one's home and family life. In both cases, the possibility to rely on the Convention in subject to precise limits and applications that transcend them are destined to fail.

The right of access to information in environmental matters has been found to be a procedural implication of some substantive rights protected by the Convention. In particular, the Court has interpreted States' positive obligations under Articles 8 and 2 in the sense of including the duty to provide information enabling individuals to assess the risks associated with the exercise of hazardous activities.<sup>464</sup> These findings may allow improved public scrutiny on the exercise of hazardous activities and the enforcement of environmental legislation. Furthermore, the Court has proved willing to protect NGOs freedom of expression in the circulation of information and ideas about the activities of commercial and governmental entities, as well as their equality of arms in legal suits for defamation.<sup>465</sup> In these limited perspectives, the procedural guarantees provided by the Convention may serve to the protection of some environmental interests, supplying a forum where citizens may obtain the enforcement of environmental regulations.

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<sup>464</sup> *Guerra and others v Italy*, cit., at 60; *Öneryildiz v. Turkey*, cit., at 71; *LCB v UK*, cit., at 38; *Roche v UK*, at 161.

<sup>465</sup> *Vides Aizsardzibas Klubs v Latvia*, cit., at 49; *Steel and Morris v. UK*, cit., at 72 and 98.

## 5. Conclusions

The present paper aimed to analyze the means of environmental protection available within the framework of the European Convention of Human Rights. As recalled earlier, the link between human rights and environmental protection is justified by the intent of joining efforts. Improved environmental conditions may contribute to the fulfilment of human rights standards; meanwhile the achievement of a high level of compliance with human rights law is susceptible of ensuring better environmental protection. In the perspective of existing law, failure to tackle environmental degrade may result in the violation of some human rights that depend upon certain environmental characteristics. In this connection, State s' implementation of the commitments they have already made may ensure better environmental protection, as a *logical corollary* of human rights obligations.<sup>466</sup>

Although the European Convention of Human Rights does not contain any explicit reference to the environment or to environmental rights, the European Court of Human Rights' recent case law has taken some significant steps in this direction. The Court's initiative has been supported by the Council of Europe through the publication of the Manual on Human Rights and the Environment.<sup>467</sup> Thus, aside from the perspective of introducing a specific human right to a healthy environment, the Council of Europe has left it to the Court to establish the circumstances under which environmental interests may obtain protection within the framework of the European Convention of Human Rights.

Initially the Court displayed a fairly restrictive approach to environmental claims, rejecting them as incompatible with the Convention *ratione materiae*. Over the years, however, there has been an increasing acknowledgment that some of the rights protected by the Convention may have an environmental dimension.

First of all, the right to respect for one's home, private and family life may be decisively impaired by environmental conditions. The jurisprudence on the matter is well-established and the Court has extended the notion of interference under Article 8 to a number of environmentally sensitive intrusions, such as excessive noise levels, fumes, smells and toxic emissions. Early decisions have acknowledged that positive obligations incumbent upon national authorities require the existence and effective implementation of appropriate domestic standards protecting against these intrusions.<sup>468</sup> Later decisions have brought further evolutions, as the Court identified with greater precision the factors relevant to the application of Article 8, proving more willing to require States to provide justification for their environmental policies.<sup>469</sup>

The Court has acknowledged the link between environmental conditions and the full enjoyment of the right to life only in one crucial precedent,<sup>470</sup> where it found that

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<sup>466</sup> Cf. M. ANDERSON, Human Rights Approaches to Environmental Protection: an Overview, in M. ANDERSON, A. BOYLE eds., Human Rights Approaches to Environmental Protection, Oxford, 1996, p. 8.

<sup>467</sup> In particular, the Manual prologue expressly mentions that 'the existing case-law of the European Court of Human Rights demonstrates that the Convention already offers a certain degree of protection in relation to environmental issues through existing Convention rights and their interpretation in the case-law of the Court'. Cf. Manual on Human Rights and the Environment, cit., at 2.

<sup>468</sup> Cf. López-Ostra v Spain and Guerra and others v Italy, cf. retro, Chapter 2.

<sup>469</sup> Fadeyeva v Russia, at 105; Taskin and others v Turkey, at 117; Öneriyıldız v. Turkey, GC, at 107.

<sup>470</sup> Öneriyıldız v. Turkey, cf. retro, Chapter 3.

positive obligations under Article 2 include putting in place legislative and administrative frameworks governing the exercise of dangerous activities, together with procedures granting public access to information and identifying shortcomings in the exercise of such activities.<sup>471</sup> The right to life may therefore be deployed to complain against domestic authorities' failure to implement environmental regulations, as far as they are aimed at protecting from serious risk to human life.

Also the procedural rights protected by the Convention have found some application in environmental cases. In particular, the Court has applied the procedural guarantees under Article 6 to claims grounded on domestic rights to a healthy environment, provided that the applicants' *locus standi* had been acknowledged by national courts. On the other hand, the right to an effective remedy under Article 13 has been found to apply to environmental cases whenever it is possible to establish a link with a substantive right protected under the Convention.

Additionally, the Court's recent case law has placed considerable emphasis on the right to information. The substantive rights contained in the Convention have been increasingly interpreted in the sense to include procedural guarantees requiring State authorities to supply information on a number of environmentally sensitive issues, such as the exercise of dangerous activities.<sup>472</sup> The Court has further proved willing to protect environmental campaigners' freedom of expression in the circulation of information and ideas about the activities of corporations and governmental bodies,<sup>473</sup> as well as the right to enjoy equality of arms in law suits for defamation.

The new jurisprudence poses crucial questions on the interpretation of the Convention and the admissibility requirements to bring a case to the Court. The most salient feature is the consistent dilution of the victim requirement under Article 34, which has been *widened*, allowing a larger number of applicants to bring successful environmental claims under the Convention. As recalled earlier, the Court supplies a fundamentally repressive system, aimed to remedy violations of human rights and only exceptionally to prevent them. However, in the protection of environmental resources, which are often irreplaceable, preventative action is of fundamental importance.

The Court's initial line was to require *reasonable and convincing evidence* of the *probability of the occurrence of a violation* concerning the applicants *personally*, as *mere suspicions or conjectures* were not enough.<sup>474</sup> This high threshold allowed the protection of environmental interests only in cases where material damage to the applicant's personal sphere had already occurred,<sup>475</sup> preventing the application of the Convention to cases where the damage was merely potential<sup>476</sup> or the causal link could was not univocal.<sup>477</sup>

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<sup>471</sup> Öneriyıldız v. Turkey, GC, at 89-90.

<sup>472</sup> Öneriyıldız v. Turkey, GC, cf. Chapter 3; Guerra and others v Italy, cf. Chapter 2; Roche v UK, cf. Chapter 4.

<sup>473</sup> Vides Aizsardzibas Klubs v Latvia; Steel and Morris v UK, cf. Chapter 4.

<sup>474</sup> Asselbourg v Luxembourg, cit., at 1.

<sup>475</sup> Cf. e.g. Lopez Ostra v Spain.

<sup>476</sup> Cf. Balmer-Schafroth and others v Switzerland; Asselbourg v Luxembourg; Athanassoglou and others v Switzerland.

<sup>477</sup> Cf. Tauria and others v France; LCB v UK.

Later jurisprudence has progressively eroded these criteria, as the Court has instituted a twofold approach to environmental cases. Where applicants are unable to obtain any recognition of their rights at the domestic level, the Court demands that they prove a certain prejudice within their personal sphere.<sup>478</sup> Where applicants have obtained the acknowledgement of their rights by domestic courts, on the other hand, the Court does not ask applicants to demonstrate a *serious, specific and imminent danger*, being satisfied by the assessment carried about by domestic courts in this respect.<sup>479</sup>

Most importantly, the decision of *Fadeyeva v Russia* has supplied a pioneering solution to the question of evidence, establishing the applicant's victim status on *indirect evidence and presumptions* resulting from breach of domestic legislation and lack of cooperation on part of the defendant State.<sup>480</sup> The causal jump done by the Court makes it easier for applicants to claim that their rights have been breached whenever domestic authorities prove uncooperative. These findings are particularly remarkable if one considers that in environmental cases the class of potentially affected individuals is usually large.<sup>481</sup> Furthermore, the Court's progressive interpretation may spread to other provisions under the Convention, such as the prohibition of inhuman and degrading treatment and the prohibition of discrimination.<sup>482</sup> It now remains to be seen how this jurisprudence will be affected by the new admissibility criteria set out in Protocol No. 14 to the Convention, which require a *significant disadvantage* in the applicant's personal sphere.<sup>483</sup>

Environmental law does not suffer from lack of regulation, but rather of its enforcement. The European Court of Human Rights is susceptible of playing an increasingly important role in the implementation of environmental standards, working as a supplement to national measures and stimulus to pre-emptive action by States. Bringing environmental interests within this framework can offer a clear procedural advantage to complainants at the international level, supplying a forum for redress and even precautionary remedies for victims of environmental abuse. This may only happen in the limited instances where environmental interests may be translated into human rights claims.

The standards discovered in human rights instruments cannot stand as a substitute for a proper regime for the protection of the environment and some environmental interests escape protection altogether, unless States have already taken the initiative to create rights in national law. Even then, the protection obtained by way of human rights law would be procedural rather than substantive. Nonetheless, we should not underestimate what measures human rights law can supply, nor their capacity for development as the cases considered in this thesis quite clearly show. It is therefore

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<sup>478</sup> Cf. *López-Ostra v Spain* and, more recently, *Moreno Gomez v Spain*.

<sup>479</sup> Cf. *Taskin and others v Turkey*; *Fadeyeva v Russia*; *Öçkan and others v Turkey*; *Okyay and others v Turkey*.

<sup>480</sup> *Fadeyeva v Russia*, at 80.

<sup>481</sup> Cf. the cases *Taskin and others v Turkey* *Öçkan and others v Turkey*, Chapter 2. Cf. also the cases of Mrs. *Fadeyeva's* fellow citizens: *Ledyayeva v Russia*, Application No. 53157/99, currently pending; *Dobrokhoytova v Russia*, Application No. 53247/99, currently pending; *Zolorateva v Russia*, Application No. 53695/00, currently pending; *Romashina v Russia*, Application No. 56850/00, currently pending.

<sup>482</sup> Cf. *Selmouni v. France*, Application No. 25803/94, at 101: 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'

<sup>483</sup> On Protocol No. 14 to the Convention, Cf. *retro*, Chapter 1.

commendable that environmental lawyers are aware of the avenues available in this perspective, in order to exploit them fully, when feasible.

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